

1 IN THE CIRCUIT COURT OF OHIO COUNTY
2 WHEELING, WEST VIRGINIA
3
4

5 IN RE:

6 TOBACCO LITIGATION CASE NO. 00-C-6000
7
8 MEDICAL MONITORING CASES

9
10 * * *

11 JURY TRIAL
12
13 Whereupon the above-entitled matter came on for
14 hearing before the Honorable Arthur M. Recht at the
15 Ohio County Courthouse, Wheeling, West Virginia, and
16 the proceedings are as follows.

17
18 * * *

19
20 VOLUME 17-A

21 November 12, 2001

22 8:30 a.m.
23
24 * * *

1 APPEARANCES:

2

3 ON BEHALF OF THE PLAINTIFFS:

4

5 FREDERICK BAKER, Esquire
6 JERRY H. EVANS, Esquire
7 WILLIAM MICHAEL GRUENLOH, Esquire
8 GREGORY LOFSTEAD, Esquire
9 Ness, Motley, Loadholt, Richardson & Poole, a
10 Professional Association, 151 Meeting Street, P.O.
11 Box 1137, Charleston, South Carolina 29402
12 and

13 SCOTT S. SEGAL, Esquire
14 DEBORAH McHENRY, Esquire

15 The Segal Law Firm, 810 Kanawha Boulevard, East,
16 Charleston, West Virginia 25301
17 and

18 R. SCOTT LONG, Esquire
19 Hendrickson & Long, 214 Capitol Street, P.O. Box
20 11070, Charleston, West Virginia 25339
21 and

22 DAVID RODES, Esquire
23 Goldberg, Persky, Jennings & White, P.C., 1030 Fifth
24 Avenue, Pittsburgh, Pennsylvania 15219-6259

1 APPEARANCES (Cont'd)

2

3 ON BEHALF OF PHILLIP MORRIS:

4

5 SAMUEL E. KLEIN, Esquire

6

7 SEAN P. WAJERT, Esquire

8

ANDREW GADDES, Esquire

9

Dechert, Price & Rhoads, 4000 Bell Atlantic Tower,

10

1717 Arch Street, Philadelphia, Pennsylvania

19103-2793

11

and

12

DAVID B. THOMAS, Esquire

13

PAMELA L. KANDZARI, Esquire

14

Allen, Guthrie & McHugh, 1300 Bank One Center, P.O.

15

Box 3394, Charleston, West Virginia 25333-3394

16

17

18 ON BEHALF OF LORILLARD TOBACCO COMPANY:

19

20 J. WILLIAM NEWBOLD, Esquire

21

ADAM E. MILLER, Esquire

22

ANNE KONOLD, Esquire

23

Thompson & Coburn, LLP, One Firststar Plaza,

24

St. Louis, Missouri 63101

6304

1

and

2

MICHAEL FARRELL, Esquire

3

Farrell, Farrell & Farrell, L.C., The Farrell

4

Building, 914 Fifth Avenue, P.O. Box 6457,

5

Huntington, West Virginia 25772-6457

6

7

8 ON BEHALF OF R. J. REYNOLDS TOBACCO COMPANY:

9

10

FAZAL SHERE, Esquire

11

Bowles, Rice, McDavid, Graff & Love, PLLC, 600

12

Quarrier Street, P.O. Box 1386, Charleston, West

13

Virginia 25325-1386

14

and

15

JEFFREY L. FURR, Esquire

16

MARILYN R. FORBES, Esquire

17

Womble Carlyle Sandridge & Rice, Post Office Drawer

18

84, Winston-Salem, North Carolina 27102

19

20

21

22

23

24

6305

1

Appearances (Cont'd.)

2

3 ON BEHALF OF BROWN & WILLIAMSON TOBACCO CORPORATION:

4

FRANK WOODSIDE, III, Esquire

5

SCOTT A. CRISLER, Esquire

6

MARY-JO MIDDELHOFF, Esquire

7

Dinsmore & Shohl, LLP, 1900 Chemed Center, 255 East

8

Fifth Street, Cincinnati, Ohio 45202-3172

9

and

10

W. HENRY JERNIGAN, JR., Esquire

11

Jackson & Kelly, P.O. Box 553, Charleston, West

12

Virginia 25332

13

And

14

TAD V. GREENE, Esquire

15

Jackson & Kelly, Laconia Building, Wheeling, West

16

Virginia 26003

17

18

19

20

(There are other counsel representing interested
parties also present in the courtroom gallery.)

21

22

23

24

6306

1 Monday Morning Session

2 November 12, 2001

3 8:30 a.m.

4 --- --

5 P R O C E E D I N G S

6 --- --

7 (In open court without a jury present:)

8 THE COURT: Be seated, please.

9 All right. Good morning. I understand --

10 well, first off, I have the supplemental objections
11 that we discussed on Friday. I presume that's what
12 we discussed on Friday. And they are filed?

13 MR. KLEIN: Yes, Your Honor.

14 THE COURT: And ordered a part of the record in
15 this proceeding. And for purposes of the record,
16 the objections are noted, overruled, objection
17 preserved.

18 Now, are there other matters that need to be
19 addressed?

20 MR. FURR: I have one other matter, Your
21 Honor. I hope it's going to be noncontroversial.

22 I was told late last night that I need to
23 formally move the Court for permission for each of
24 the defendants to offer a closing argument.

6307

1 THE COURT: Is that right?

2 MR. FURR: That's what I was told, Your Honor.

3 I didn't want to take the chance. I can assure the
4 Court that the arguments are not going to be of
5 equal length, but each of the defendants in the case
6 have decided we would like a chance to address the
7 jury.

8 MR. SEGAL: There is no objection to that.

9 THE COURT: Yeah. As a matter of fact, I
10 thought, I thought I had said that's fine two or
11 three days ago. But that's fine. It's better to
12 be --

13 MR. FURR: Thank you. I didn't want to get
14 stopped after mine.

15 THE COURT: No, no, that's fine. We are making
16 copies of the charge, and we want to wait until we

17 get those.

18 Everything we do today -- this is ordered
19 filed, the supplemental. I'm dating it the 13th.
20 Technically, if you want to be very technical, today
21 is a nonjudicial day, believe it or not. But we are
22 making it -- it shows you the power.

23 So there is no misunderstanding, I'm going to
24 just order it filed as of the 13th so it's clearly

6308

1 filed, and there will be no problem.

2 Well, we are still waiting, so as soon as we
3 get -- we can't start without the charge.

4 I did receive the index on the exhibits.
5 That's fine. Good job. And they are all back there
6 now waiting -- so the only thing we need to do --
7 what's the problem?

8 THE CLERK: The stapler broke so they need to
9 borrow one, a big one.

10 THE COURT: The stapler is broken. So it will
11 be just a few minutes and then we will get started.

12 (A recess is taken.)

13 (In open court with a jury present.)

14 THE COURT: All right. Be seated.

15 Good morning. Sorry for the delay, but we had
16 to put the last minute touches on the charge.

17 Does everybody have a 33-page document called
18 "Judge's Charge To The Jury"?

19 All right. As I have indicated to you at
20 various points throughout this trial, this is that
21 phase of the case where it becomes my responsibility
22 to give you the law as it applies to this case.

23 It is rather lengthy, obviously. I would like
24 to just give it to you and have you read it, but I

6309

1 have to read it to you.

2 The important thing is that this is yours. In
3 other words, it's not going to be taken from you.
4 You will have it during your deliberations so that
5 you will not have to say, What did he say about the
6 law relating to X; you will have it right there.
7 And it I believe makes your deliberations more
8 effective.

9 All right. Let's start into it.

10 Members of the jury, you have heard the opening
11 statements of the lawyers, you have heard the
12 testimony of the witnesses, and soon you will hear
13 the closing arguments of the lawyers.

14 At this point in the trial, I, as the trial
15 Judge, am required to inform you, the jury, as to
16 the law applicable to this case which shall guide
17 you in your deliberations.

18 This statement of the law is known as the
19 "Judge's Charge To The Jury." It's also called
20 "Jury Instructions."

21 Members of the jury, it is your exclusive duty
22 to determine the facts of this case. Quite often
23 you are referred to as the judges of the facts.
24 It's my duty to state to you the law of this case.

6310

1 Your oath as a juror requires you to apply the law
2 as given to you by this Court to the facts
3 determined by you from the evidence.

4 You are not permitted to change the law or

5 apply your own ideas of what you think the law
6 should be. Both this Court and you, the jury, are
7 bound by the law as stated and expressed in this
8 charge.

9 Nothing said or done by the lawyers who have
10 tried this case is to be considered by you as
11 evidence of any fact. Opening statements of the
12 lawyers are intended to give you an outline of what
13 each side expects to prove so that you may better
14 understand the testimony of the witnesses.

15 The closing arguments, which you will hear in a
16 few minutes, are often very helpful in refreshing
17 your recollection as to the testimony of the
18 witnesses and such facts as may be developed by the
19 testimony.

20 It's my duty to caution you that your verdict
21 should not be based upon statements made to you by
22 the lawyers at the opening of the trial or upon
23 their closing arguments.

24 Your verdict, in other words, shall be based

6311

1 upon the evidence as you hear it from the witness
2 stand and as you recollect it, not as the lawyers or
3 this Court may recollect it.

4 Likewise, nothing that I have said or done at
5 any time during this trial shall be considered by
6 you as evidence of any fact or as indicating any
7 opinion concerning any fact, the credibility of the
8 witnesses or the weight of the evidence.

9 The Court instructs the jury that it should
10 disregard entirely questions to which an objection
11 was sustained or answers or exhibits ordered
12 stricken out of the evidence.

13 It is not the province of the jury to determine
14 the admissibility or validity of the testimony. Do
15 not draw any conclusions or speculations as to why
16 or why not certain testimony or other evidence was
17 excluded or admitted.

18 While you should consider only the evidence in
19 this case, you are permitted to draw such reasonable
20 inferences from the testimony as you feel are
21 justified in the light of common sense.

22 In other words, you may make deductions and
23 reach conclusions which reason and common sense lead
24 you to draw from the facts which have been

6312

1 established from the testimony and the evidence in
2 this case.

3 Now, I have said that you must consider all of
4 the evidence. This does not mean, however, that you
5 must accept all the evidence as true or accurate.

6 You are the sole judges of the credibility or
7 believability of each witness and the weight to be
8 given to his or her testimony.

9 As used in this charge, credibility of a
10 witness means the truthfulness or the lack of
11 truthfulness of a witness, the weight of the
12 evidence means the extent to which you are or are
13 not convinced by the evidence.

14 The number of witnesses testifying on one side
15 or the other of any issue is not alone the test of
16 the credibility of the witness and the weight of the
17 evidence. If warranted by the evidence, you may

18 believe one witness against a number of witnesses
19 testifying differently.

20 The tests are how truthful is a witness and how
21 convincing is his or her evidence in the light of
22 all of the evidence and circumstances shown.

23 In determining the credit and weight you will
24 give to the testimony when a witness has testified

6313

1 before you, you may consider, if found by you from
2 the evidence, his or her good memory or lack of
3 memory, his or her interest or lack of interest in
4 the outcome of the trial, his or her demeanor in the
5 manner of testifying, his or her opportunity or
6 means or lack of opportunity and means of having
7 knowledge of the matters concerning which he or she
8 testified, the reasonableness or unreasonableness of
9 his or her testimony, and his or her fairness or
10 lack of fairness.

11 From these and all other conditions and
12 circumstances appearing from the evidence, you may
13 give to the testimony of the witnesses such credit
14 and weight as you believe it is entitled to receive.

15 The Court instructs the jury that the Rules of
16 Evidence ordinarily do not permit an opinion to be
17 received as evidence. A witness qualified as an
18 expert by knowledge, skill, experience, training or
19 education may testify thereto in the form of an
20 opinion or conclusion.

21 You should weigh the reasons, if any, given for
22 it. You may also consider the process of his or her
23 reasoning, his or her possible bias in favor of the
24 side for which he or she testified, his or her

6314

1 relative opportunities for study and observation in
2 that which he or she testified, and any other
3 matters which serve to illuminate his or her
4 opinions and conclusions.

5 You should consider each expert opinion
6 received in evidence in this case and give it such
7 weight as you may think it deserves. If you should
8 decide that the opinion of an expert witness is not
9 based upon sufficient education, experience, or if
10 you should conclude that the reasons given in
11 support of the opinion are not sound, or if you feel
12 that it is outweighed by other evidence, you may
13 disregard the opinion entirely.

14 A witness may be discredited or impeached by
15 contradictory evidence, by showing that he or she
16 testified falsely concerning a material matter, or
17 by evidence that, at some other time, a witness has
18 said or done something, or has failed to do or say
19 something which is inconsistent with the witness'
20 present testimony.

21 Inconsistencies or discrepancies in the
22 testimony of a witness or between the testimony of
23 different witnesses may or may not cause the jury to
24 discredit such testimony.

6315

1 Two or more persons witnessing an incident or
2 transaction may see it or hear it differently. An
3 innocent misrecollection, like failure of
4 recollection, is not an uncommon experience.

5 In weighing the effect of a discrepancy, also

6 consider whether it pertains to a matter of
7 importance or an unimportant detail, and whether the
8 discrepancy results from innocent error or
9 intentional falsehood.

10 If you believe that any person testifying in
11 this case has knowingly testified falsely as to any
12 material fact, you may believe such parts of their
13 testimony as you believe to be true, and reject such
14 parts as you believe to be false, or you may refuse
15 to believe any part of such testimony, for it is a
16 matter for you to determine from all the testimony
17 taken and all the circumstances surrounding this
18 case which witnesses have testified truthfully and
19 which ones, if any, have testified falsely.

20 During the trial of this case, certain
21 testimony has been presented to you by way of
22 depositions read from the witness stand and
23 depositions previously recorded -- we will call them
24 depositions -- which consisted of sworn recorded

6316

1 answers of questions asked of the witness in advance
2 of this trial.

3 The testimony of a witness who for some reason
4 cannot be present to testify in person from the
5 witness stand may be presented under oath by way of
6 depositions.

7 Such testimony is entitled to the same
8 consideration, is to be judged as to credibility,
9 weighed and otherwise considered by the jury in the
10 same way as if the witness had been present and had
11 testified from the witness stand.

12 During the course of trial, you saw and heard
13 portions of a videotaped deposition of Dr. Thomas
14 Osdene, former director of research for
15 Philip Morris, Incorporated in which Dr. Osdene
16 declined to answer questions based on his Fifth
17 Amendment privilege against self-incrimination.

18 You may draw an inference from Dr. Osdene's
19 refusal to testify that his answers, had he
20 responded to questioning, would have been adverse to
21 his interest and to that of his former employer at
22 Philip Morris. However, you may not draw such an
23 inference if you find that Dr. Osdene was not under
24 the control of Philip Morris at the time he invoked

6317

1 his Fifth Amendment privilege.

2 As I indicated to you during the voir dire,
3 this is a civil case. In a civil case, the burden
4 of proof is upon the party instituting the suit to
5 prove every essential element of the relief claimed
6 by a preponderance of the evidence.

7 If the proof should fail to establish an
8 essential element of the relief claimed by the
9 instituting party by a preponderance of the evidence
10 in this case, then the jury should find for the
11 party against whom relief is sought.

12 To establish by a preponderance of the evidence
13 means to prove that something is more likely so than
14 not. In other words, a preponderance of the
15 evidence in a case means such evidence as, when
16 considered and compared with that opposed to it, has
17 more convincing force and produces in your minds
18 belief that what is sought to be proven is more

19 likely true than not true.

20 This rule does not, of course, require proof to
21 an absolute certainty, since proof to an absolute
22 certainty is seldom possible in any case.

23 In determining whether any fact in issue has
24 been proven by a preponderance of the evidence in

6318

1 this case, you, the jury, may, unless otherwise
2 instructed, consider the testimony of all witnesses,
3 regardless of who may have called them, and all
4 exhibits received in evidence, regardless of who may
5 produce them.

6 By preponderance of the evidence is meant the
7 greater weight of the evidence. It does not
8 necessarily mean that a greater number of witnesses
9 have testified on one side of the case or on the
10 other. The preponderance lies on the side whose
11 testimony taken all together is more satisfactory
12 and convincing to you.

13 As I have indicated, this burden of proof
14 standard must be met by all members of the class
15 claiming relief in the form of medical monitoring
16 and, throughout the remainder of this charge, that
17 is referred to, that group, is called "the class."

18 If the evidence of the class, the parties
19 having the burden of proof, does not outweigh that
20 of the tobacco companies -- namely, Philip Morris,
21 Incorporated, R. J. Reynolds, Incorporated, Brown &
22 Williamson, Incorporated, and P. Lorillard Company,
23 and throughout the remainder of this charge they are
24 referred to as "the tobacco companies" -- the party

6319

1 against whom relief is sought or, if the evidence is
2 evenly balanced, then the class has failed to meet
3 its burden of proof requirement.

4 On the other hand, if the evidence of the class
5 outweighs the tobacco companies, even in the
6 slightest degree, then the class has met its burden
7 of proof. In other words, the class merely needs to
8 prove its claim is more likely so than not.

9 Excuse me.

10 You are instructed that this is a class action
11 brought by the class on behalf of a class consisting
12 of all West Virginia residents who, on or after
13 January 31, 195, purchased and smoked cigarettes
14 manufactured, marketed and/or sold by the tobacco
15 companies, who as of December 4, 2000, had a minimum
16 of a five-pack-year smoking history, who have not
17 been diagnosed with any of the following smoking-
18 related diseases; cancer of the lip, oral cavity or
19 pharynx; cancer of the esophagus, cancer of the
20 stomach, cancer of the pancreas, cancer of the
21 larynx, cancer of the trachea, bronchus or lung,
22 cancer of the cervix, uteri, cancer of the bladder,
23 cancer of the kidney or other urinary organs,
24 coronary heart disease, cerebrovascular diseases,

6320

1 bronchitis or emphysema or chronic airway
2 obstructions and who have not received healthcare
3 paid or reimbursed directly or indirectly by the
4 State of West Virginia. That is referred to as "the
5 class."

6 Consequently, the class includes both smokers

7 and former smokers who have the requisite five-pack-
8 year exposure. A pack year means a pack of twenty
9 cigarettes per day for one year, or the same amount
10 of cigarettes over a longer or shorter period of
11 time.

12 The class may include smokers or former smokers
13 who have smoking-related disease as long as the
14 disease has not been diagnosed. The purpose of the
15 monitoring sought by the class is to detect whether
16 or not certain undiagnosed diseases are present.

17 The tobacco companies, Philip Morris
18 Incorporated, R. J. Reynolds, Incorporated, Brown &
19 Williamson, Incorporated and P. Lorillard and
20 Company, are corporations and, as such, can only act
21 through their officers, agents and employees.

22 Each corporation is responsible for the actions
23 or omissions of its employees and agents, and is
24 charged with knowledge of whatever its employees or

6321

1 agents know related to the corporations business.

2 Further, you are instructed that & Williamson
3 Tobacco Company, a successor to the American Tobacco
4 Company, is liable for any proven tortious conduct
5 on the part of the American Tobacco Company.

6 You are instructed that, if two or more persons
7 do a tortious act or acts in concert or pursuant to
8 a common design, then each is liable for the harm
9 caused thereby.

10 Parties are acting in concert when they act in
11 accordance with an agreement to cooperate in a
12 particular line of conduct or to accomplish a
13 particular result.

14 The agreement need not be expressed in words;
15 it may be implied and understood to exist from the
16 conduct itself. The mere common plan, design or
17 even express agreement is not enough for liability,
18 as there must be acts of tortious character in
19 carrying it to execution.

20 The Court instructs the jury that, under the
21 laws of the State of West Virginia, a cause of
22 action exists for the recovery of medical monitoring
23 costs where it can be proven that such expenses are
24 necessary and reasonably certain to be incurred as a

6322

1 proximate result of a tobacco company's tortious
2 conduct.

3 This is sometimes referred to as a medical
4 monitoring claim. In order to sustain a claim for
5 medical monitoring expenses under West Virginia law,
6 the class must prove that, one, they have, relative
7 to the general population, been significantly
8 exposed; two, to a proven hazardous substance;
9 three, to the tortious conduct of the tobacco
10 companies; four, as a proximate result of the
11 exposure, the class has an increased risk of
12 contracting a serious latent disease; five, the
13 increased risk of disease makes it reasonably
14 necessary for the class to undergo periodic
15 diagnostic medical examinations different from what
16 would be prescribed in the absence of the exposure;
17 and six, monitoring procedures exist that make the
18 early detection of a disease possible.

19 This Court previously ordered that the trial of

20 this action be bifurcated or split into two phases.
21 The first phase, which is the phase that we are in
22 now, is concerned only with questions concerning the
23 tobacco companies' conduct and whether that conduct
24 was tortious, as well as whether the legal

6323

1 requirements for medical monitoring have been met.

2 You are instructed to consider evidence of
3 public knowledge of the risks of smoking only in the
4 context that it reflects on the tobacco companies'
5 conduct.

6 You are instructed that reasons for smoking are
7 not an issue in this phase of the trial, and
8 accordingly whether the tobacco companies' conduct
9 did or did not affect smoking decisions by the class
10 members should not enter into your deliberation.

11 You are instructed that this Court has found as
12 a matter of law that the class, relative to the
13 general population, has been significantly exposed
14 to a proven hazardous substance; the smoking of
15 cigarettes.

16 Accordingly, you are required to accept the
17 Court's determination without further deliberation
18 on these two elements of a medical monitoring
19 claim.

20 You are instructed that this Court's
21 determination of these issues as a matter of law
22 should not bias you in favor of either party or
23 prejudice you against either party, nor influence
24 you in any way in the determination of the remaining

6324

1 issues submitted to you for your -- for a decision
2 in this case.

3 Now, I will instruct you on the remaining
4 elements of what the class must by -- prove by a
5 preponderance of the evidence to be entitled to
6 medical monitoring relief and, thereafter, to
7 instruct you as to the law relating to the alleged
8 willful, wanton and reckless conduct of the tobacco
9 companies.

10 Now, we will talk about tortious conduct.
11 Liability for medical monitoring is predicated upon
12 the tobacco companies being legally responsible in
13 connection with the class' exposure to a hazardous
14 substance.

15 Tortious conduct means conduct in breach of a
16 legal duty. It is for the Court to determine the
17 nature of the tobacco companies' duties, and it is
18 for the jury to decide whether those duties have
19 been fulfilled or breached.

20 The class has advanced three theories
21 concerning the alleged tortious conduct of the
22 tobacco companies with respect to the hazard of
23 cigarette smoke. These correspond to three subparts
24 under Question 3 in the verdict form which will be

6325

1 furnished to you.

2 And that will be given you to when you begin
3 your deliberation, and you will see each -- there
4 will be questions set out in the verdict form to
5 assist in reaching your deliberation, and that's
6 what we are referring to here when we say that
7 Question 3 is broken down into the three theories

8 under which the tortious conduct of the tobacco
9 company is alleged.

10 The considerations governing these theories may
11 overlap. You are instructed that the law permits
12 assertion of alternative theories. You are
13 instructed that Congress passed a law effective July
14 1, 1969 requiring that every pack of cigarettes bear
15 a specific warning label written by Congress
16 itself.

17 There is no contention and can be no contention
18 in this case that these warnings are inadequate.
19 Later, Congress required that warnings appear in
20 each cigarette brand advertisement.

21 Thus, federal law requires that tobacco
22 companies put warnings on their cigarette packages
23 and dictates exactly what the warnings must say.
24 The tobacco companies are not permitted to change

6326

1 those warnings.

2 The law also says that the pack warnings are
3 legally adequate to warn the public including
4 smokers of any adverse health consequences of
5 smoking.

6 You may not base liability in this case on any
7 view or personal belief that the tobacco companies
8 should have included additional or more clearly
9 stated warnings on their cigarette packages or in
10 their advertisements in addition to the
11 Congressionally mandated warnings.

12 Now, let's talk about product defect. Are the
13 cigarettes which were manufactured, designed and
14 sold by the defendant tobacco companies defective in
15 the sense of being not reasonably safe for their
16 intended use?

17 A manufacturer or supplier of a product has a
18 duty to assure that the product is reasonably safe
19 for its intended use. A product that is not
20 reasonably safe for its intended use is considered
21 defective.

22 A product may be defective, although it is a
23 legal product, and although it is accompanied by
24 appropriate warning labels. The question of what is

6327

1 an intended use of a product carries with it the
2 concept of all those uses a reasonably prudent
3 person might make of the product, having in mind its
4 characteristics, warnings and labels.

5 The product is to be tested by what a
6 reasonably prudent manufacturer would accomplish in
7 regard to the safety of the product, having in mind
8 the general state of the art of the manufacturing
9 process at the time the product was made. A product
10 that is not as safe as a reasonably prudent
11 manufacturer could have made it is not reasonably
12 safe and thus is defective.

13 Accordingly, if you believe by a preponderance
14 of the evidence of that the tobacco companies
15 designed, manufactured and sold a defective product
16 as defined herein, then you shall answer yes as to
17 that question on the verdict form.

18 If on the other hand, you do not believe by a
19 preponderance of the evidence that the tobacco
20 companies designed, manufactured and sold a

21 defective product, you shall answer no to that
22 question on the verdict form.

23 Now, let's talk about negligence. This is
24 another theory advanced by the plaintiffs. Were the

6328

1 tobacco companies negligent in the design,
2 manufacture and sale of their cigarettes?

3 A manufacturer has a duty to take reasonable
4 care in the design, manufacture and sale of its
5 products. It is for you to decide the level of
6 commitment in nature and extent of research and
7 development that would be appropriate, having regard
8 to the importance of the safety problem and the
9 resources available to commit to its solution.

10 The liability to make reparation for an injury
11 by negligence is founded upon an original moral duty
12 enjoined upon every person so as to conduct himself
13 so as not to injure another. This is a duty which
14 all actors in an organized society owe to their
15 fellow persons.

16 Negligence is either the failure to do what a
17 reasonable and prudent person would ordinarily have
18 done under the circumstances, or doing what such a
19 person under existing circumstances would not have
20 done.

21 Negligence occurs when a party engages in
22 conduct unaccompanied by that degree of
23 consideration attributable to the man of ordinary
24 prudence under like circumstances. In other words,

6329

1 negligence is the violation of a duty of taking care
2 under the given circumstances.

3 The level of care should be in proportion to
4 the danger apparent and within reasonable
5 anticipation. The care which the actors are
6 required to exercise to avoid being negligent is
7 that which a reasonable person in his position, with
8 his information and competence, would recognize as
9 necessary to prevent the act from creating an
10 unreasonable risk of harm to another.

11 The duty is not absolute, but it's also
12 relative to circumstances of time, place and
13 manner. For purposes of this case, negligence is
14 actionable if it contributes to the hazardous nature
15 of cigarettes.

16 Where a tobacco companies' acts or omissions
17 have decreased the opportunity to avoid a risk of
18 harm, and that decreased opportunity was a
19 substantial factor in the ultimate risk, then the
20 tobacco company has contributed to the resulting
21 ultimate risk.

22 Consequently, if you find there was a
23 substantial likelihood that the tobacco companies
24 could have made their cigarettes less hazardous had

6330

1 they lived up to their duty, then you should find
2 that their breach of duty contributed to the
3 hazard.

4 Accordingly, if you believe by a preponderance
5 of the evidence that the tobacco companies acted
6 negligently in the design, manufacture and sale of
7 cigarettes, then you shall answer yes to that
8 question on the verdict form.

9 If on the other hand, you do not believe by a
10 preponderance of the evidence that the tobacco
11 companies negligently designed, manufactured and
12 sold cigarettes, then you shall answer no to that
13 question on the verdict form.

14 Next, breach of undertaking. Did the tobacco
15 companies fail to live up to any undertaking in the
16 Frank Statement? A company has a duty to live up to
17 commitments that it voluntary undertakes for the
18 benefit of its customers.

19 In this case, anything that the tobacco
20 companies said that it would do in the Frank
21 Statement to Cigarette Smokers is an undertaking.
22 The defendants have been legally obligated to comply
23 fully with each of the undertakings in the Frank
24 Statement at all times since 1954.

6331

1 For purposes of this case, breach of an
2 undertaking is actionable if it contributes to the
3 hazardous nature of cigarettes. Where a tobacco
4 company's acts or omissions have decreased the
5 opportunity to avoid a risk of harm, and that
6 decreased opportunity was a substantial factor in
7 the ultimate risk, then the tobacco company has
8 contributed to the resulting ultimate risk.

9 Consequently, if you find there was a
10 substantial likelihood that the tobacco companies
11 could have made their cigarettes less hazardous had
12 they lived up to their duty, then you should find
13 that their breach of duty contributed to the hazard.

14 Accordingly, if you believe by a preponderance
15 of the evidence that the tobacco companies failed to
16 live up to any undertakings in the Frank Statement,
17 then you shall answer yes to that question on the
18 verdict form.

19 If on the other hand you do not believe by a
20 preponderance of the evidence that the tobacco
21 companies failed to live up to any undertakings in
22 the Frank Statement, then you shall answer no to
23 that question on the verdict form.

24 Increased risk. The class is required to prove

6332

1 by a preponderance of the evidence that, as a
2 proximate result of the significant exposure
3 alleged, class members are at an increased risk of
4 contracting a serious latent disease, specifically
5 lung cancer, COPD, which is chronic obstructive
6 pulmonary disease, but we have shortened it up to
7 COPD here, or emphysema.

8 The class must prove that lung cancer, COPD, or
9 emphysema, are serious latent diseases. The class
10 are not required to show that these particular
11 diseases are certain or likely to occur in a given
12 smoker as a result of exposure.

13 The class must demonstrate that the class has
14 an increased risk of contracting lung cancer, COPD,
15 or emphysema relative to what would be the case in
16 the absence of their smoking. However, no
17 particular level of quantification of the risk is
18 necessary to satisfy this requirement.

19 Because the class' proposed medical monitoring
20 tests are to be given at particular ages, the class
21 must prove both that the class members are at an

22 increased risk of contracting lung cancer, COPD or
23 emphysema now; and that they will be at an increased
24 risk of disease at all times that testing would take

6333

1 place in the future.

2 Accordingly, if you believe by a preponderance
3 of the evidence of the evidence that, as a proximate
4 result of the exposure to cigarette smoke, the class
5 has suffered an increased risk of contracting a
6 serious latent disease, then you shall answer yes to
7 that question on the verdict form.

8 If on the other hand, you do not believe by a
9 preponderance of the evidence that, as a proximate
10 result of the exposure to cigarette smoke, the class
11 has suffered an increased risk of contracting a
12 serious latent disease, then you shall answer no to
13 that question on the verdict form.

14 Next is necessity of diagnostic testing. The
15 class must also prove by a preponderance of the
16 evidence that the increased risk of contracting lung
17 cancer and COPD -- shall we add emphysema there,
18 too?

19 MR. FURR: Yes, sir. To be consistent, yes,
20 sir.

21 THE COURT: We have to be consistent.

22 That should read, the class also must prove by
23 a preponderance of the evidence of the evidence that
24 the increased risk of contracting lung cancer, COPD

6334

1 or emphysema, if proven by a preponderance of the
2 evidence, makes it reasonably necessary for all
3 class members to undergo periodic diagnostic,
4 medical examinations different from what would be
5 prescribed in the absence of their smoking.

6 So the class must prove by a preponderance of
7 the evidence that their proposed medical monitoring
8 for lung cancer, a single low-dose spiral CT scan at
9 age 50 and an additional low-dose spiral CT scan
10 every year thereafter is a periodic diagnostic
11 medical examination.

12 The class must prove that their proposed
13 medical monitoring for COPD or emphysema, spirometry
14 test at age 40, at age 45 and every two years
15 thereafter, is a periodic diagnostic medical
16 examination.

17 The class must also prove by a preponderance of
18 the evidence that such medical monitoring is
19 reasonably necessary for the class. In order to be
20 reasonably necessary, there must be a reasonable
21 medical basis for undergoing the diagnostic
22 monitoring.

23 The proposed diagnostic testing must be
24 medically advisable. The requirement that the

6335

1 diagnostic testing must be medically advisable does
2 not necessarily preclude the situation where such a
3 determination is based, at least in part, upon the
4 desire of the class for information concerning the
5 state of their health.

6 You are instructed that the class must prove by
7 a preponderance of the evidence that its proposed
8 medical monitoring procedure standing alone meets
9 this element of reasonable necessity.

10 The class must show that their proposed
11 periodic medical tests are different from what would
12 be prescribed for each class member in the absence
13 of their smoking.

14 That is, diagnostic testing must be something
15 qualified physicians would prescribe based upon the
16 demonstrated exposure to a particular toxic agent;
17 in this case, the exposure of all individuals who
18 smoked at least the equivalent of one pack of
19 cigarettes per day for five years.

20 In assessing reasonable necessity, you may
21 consider whether administering a proposed test is in
22 keeping with the standard of care for physicians in
23 West Virginia. The standard of care is the degree
24 of care, skill and learning required or expected of

6336

1 a reasonable prudent healthcare provider acting in
2 the same or similar circumstances.

3 You are instructed that the ability or
4 inability to cure a disease and the presence or
5 absence of an expected reduction in mortality are
6 factors you may consider in deciding whether
7 monitoring is reasonably necessary.

8 However, the class is not required to show that
9 a treatment currently exists for the disease that is
10 the subject of medical monitoring. Monitoring may
11 be awarded even in the absence of available
12 treatment in order to remove uncertainty about the
13 presence of disease and to allow time to get affairs
14 in order in the event that an irreversible and
15 untreatable disease is detected.

16 Accordingly, if you believe by a preponderance
17 of the evidence that the increased risk of disease
18 makes it reasonably necessary for the class to
19 undergo periodic diagnostic medical examinations,
20 that which would be -- that which would be
21 prescribed in the absence of exposure, then you
22 shall answer yes to that question on the verdict
23 form.

24 If on the other hand, you do not believe by a

6337

1 preponderance of the evidence that the increased
2 risk of disease makes it reasonably necessary for
3 the class to undergo periodic diagnostic medical
4 examinations different from that which would be
5 prescribed in the absence of exposure, then you
6 shall answer no to that question on the verdict
7 form.

8 Existence of monitoring procedures. Medical
9 monitoring procedures that make early detection of
10 lung cancer and chronic obstructive lung disease or
11 emphysema possible must be available in order to be
12 necessary. If no tests for early detection for
13 these diseases exists, then medical monitoring is
14 not available.

15 This question, therefore, asks if it is
16 possible to detect lung cancer, chronic obstructive
17 lung disease or emphysema using the class' proposed
18 testing procedures standing alone.

19 Early detection means the discovery before
20 manifestation of overt symptoms. A screening test
21 such as a single low-dose spiral CT scan or
22 spirometry makes early detection of lung cancer and

23 chronic obstructive lung disease or emphysema
24 possible if it allows discovery of latent or hidden
6338

1 signs of these diseases, even though other follow-up
2 procedures are required to actually diagnose these
3 diseases.

4 Accordingly, if you believe by a preponderance
5 of the evidence that a single low-dose spiral CT
6 scan standing alone makes the early detection of
7 lung disease possible -- or lung cancer, possible,
8 I'm sorry -- then the class has satisfied its burden
9 of proof on this issue.

10 Similarly, if you believe by a preponderance of
11 the evidence that a spirometry test standing alone
12 makes the early detection of chronic obstructive
13 lung disease or emphysema possible, then the class
14 has satisfied its burden on this issue.

15 In determining whether these particular testing
16 procedures makes the early detection of the
17 disease -- of these diseases possible, you may take
18 into consideration the accuracy of each of the
19 proposed tests.

20 Accordingly, if you believe by a preponderance
21 of the evidence that monitoring procedures exist
22 that make the early detection of lung cancer
23 possible, then you shall answer yes to that question
24 on the verdict form.

6339

1 If on the other hand, you do not believe by a
2 preponderance of the evidence that medical
3 procedures exist that make the early detection of
4 lung cancer possible, then you shall answer no to
5 that question on the verdict form.

6 Further, if you believe by a preponderance of
7 the evidence that monitoring procedures exist that
8 make the early detection of emphysema or COPD
9 possible, then you shall answer yes to that question
10 on the verdict form.

11 If on the other hand you do not believe by a
12 preponderance of the evidence that medical
13 procedures exist that make the early detection of
14 emphysema or COPD possible, then you shall answer no
15 to that question on the verdict form.

16 In considering the various claims for medical
17 monitoring, you have heard testimony relating to the
18 FTC tar and FTC nicotine figures for different
19 cigarettes.

20 The cigarette manufacturers are required by law
21 to test their cigarettes using the FTC method and
22 report the results of that testing in all cigarette
23 advertising.

24 You are instructed that FTC tar and nicotine
6340

1 figures refer to measurements of the amounts of tar
2 and nicotine collected by a machine that smokes a 35
3 milliliter puff every 60 seconds and stops three
4 millimeters from the filter overwrap. The actual
5 deliveries of tar and nicotine to a human smoker are
6 not necessarily the same as the FTC figures.

7 You are instructed that there is no claim that
8 the class in this case cannot quit or are in need of
9 smoking treatment cessation devices.

10 Now, willful, wanton and reckless conduct. In

11 addition to questions relating to medical
12 monitoring, the class claims that the tobacco
13 companies acted in a willful, wanton and reckless
14 manner affecting their rights when they designed and
15 manufactured and sold cigarettes.

16 The tobacco companies deny such conduct. You
17 are instructed that every person or corporation has
18 a duty not to act or fail to act in conscious
19 disregard or in difference to a known risk of
20 serious harm from one's activities.

21 Such conscious disregard is known as
22 willfulness, wantonness or recklessness. When a
23 manufacture has actual constructive knowledge of the
24 severe health hazards and continues to design,

6341

1 manufacture and distribute that product, the
2 manufacturer may be found to have engaged in
3 willful, wanton, reckless conduct towards those
4 injured by the product.

5 To establish their claim that each tobacco
6 company in this case was engaged in willful, wanton
7 and reckless conduct, it must be shown that each
8 tobacco company was conscious of its conduct and
9 conscious from knowledge of existing conditions that
10 injury would likely or probably result from the
11 conduct; and that, with reckless indifference to the
12 consequences, each tobacco company consciously did
13 some wrongful act or omitted some known duty which
14 produced the injurious result.

15 By willful, wanton or reckless conduct, the law
16 does not mean that there necessary be ill will
17 directed toward members of a class, but the entire
18 absence of care and safety of others.

19 You have heard evidence regarding the tobacco
20 companies' public statements and their advertising
21 expenditures. The First Amendment provides that
22 persons and corporations are entitled to freedom of
23 speech and the freedom to engage in political
24 advocacy.

6342

1 A commentator who advocates one of several
2 feasible interpretations of some event or fact is
3 not liable simply because other interpretations
4 exist. And who remarks upon a subject that lends
5 itself to multiple interpretations cannot be the
6 basis of a finding of liability.

7 Expressing a particular view in scientific
8 debate is protected activity under the First
9 Amendment. You may not impose liability on a
10 tobacco company for such activities.

11 The tobacco companies also have a First
12 Amendment right to advertise their products.
13 Liability cannot be based upon a tobacco company's
14 exercise of that right or the extent to which they
15 exercised that right.

16 During the trial, you have heard reference to
17 tobacco companies' lobbying efforts. Because the
18 Constitution guarantees a right to petition the
19 government, the tobacco companies cannot be held
20 liable for attempting to influence government
21 action. That is, no liability can be based on the
22 tobacco companies' attempt to influence the passage
23 or enforcement of laws or regulation.

24 You have heard evidence about actions taken by
6343

1 the tobacco companies' lawyers. Conduct that is
2 incident to a proper response to litigation is
3 accorded protection under the First Amendment.
4 Actions taken solely to defend against litigation
5 cannot, without more, form the basis of liability in
6 this action.

7 Accordingly, if you believe by a preponderance
8 of the evidence that the tobacco companies engaged
9 in willful, wanton or reckless conduct in the
10 design, manufacture or sale of their cigarettes, you
11 shall answer yes to that question on the verdict
12 form.

13 If on the other hand you do not believe by a
14 preponderance of the evidence that the tobacco
15 companies engaged in willful, wanton or reckless
16 conduct in the design, manufacture or sale of their
17 cigarettes, you shall answer no to that question on
18 the verdict form.

19 This case should be considered and decided by
20 you as an action between persons of equal standing
21 in the community. A corporation is entitled to the
22 same fair trial at your hands as any private
23 individual. All persons, including corporations,
24 stand equal before the law and are to be dealt with

6344

1 as equals in this Court of justice.

2 The Court instructs the jury that your part in
3 the administration of justice is exceedingly
4 important. The parties in this case have come to
5 this Court for a trial on issues which have
6 developed and exists between them.

7 It is our duty, mine as Judge, yours as jurors
8 to see that all parties get a full and fair trial.
9 You have been chosen and sworn as jurors to try the
10 issues of fact presented in this case.

11 You are to perform this duty without bias or
12 prejudice to any party. The law does not permit
13 jurors to be governed by conjecture, surmise,
14 speculation, prejudice or public opinion in these
15 cases.

16 Parties to this action rightfully expect that
17 you will carefully and impartially consider all the
18 evidence in the case and that you will carefully
19 follow the law as stated to you by the Court.

20 Remember at all times you are not partisans;
21 you are judges, judges of fact. Your sole interest
22 is to seek the truth from the evidence of the case.

23 Members of the jury, this case will now be
24 submitted to you with a verdict form, which is a

6345

1 series of questions. Your duty will be discharged
2 by responding to the ones you deem appropriate based
3 on the evidence and the Court's instructions.

4 You will complete your work when you return the
5 verdict to the Court. It thereupon becomes the duty
6 of the Court to direct judgment according to law and
7 according to the facts as you have found them.

8 You are to answer the questions solely upon the
9 evidence received at this trial. You are to be
10 guided by the Court's instructions and your own
11 sound judgment in considering the evidence in this

12 case and answering these questions.

13 After the closing arguments, this case is ready
14 to be submitted to you for your serious
15 deliberation. You will consider the case fairly,
16 honestly, impartially, in light of reason, common
17 sense, giving each question in the verdict your
18 careful and conscientious consideration.

19 Let your verdict speak the truth, whatever that
20 truth may be.

21 Upon retiring to your jury room, you should
22 first select one of your number to act as foreperson
23 who will preside over your deliberations and who
24 will be your spokesperson here in Court.

6346

1 You will take the verdict form to the jury room
2 and, when you reach unanimous agreement as to the
3 verdict, you will have your foreperson fill it in,
4 date and sign it and return it to the courtroom.

5 Your verdict must represent the considered
6 judgment of each juror. In order to return a
7 verdict, it's necessary that each juror agree
8 thereto. In other words, your verdict must be
9 unanimous.

10 If, during your deliberations, you should
11 desire to communicate with the Court, please reduce
12 your message to writing, signed by the foreperson,
13 pass the note to the bailiff, who will bring it to
14 my attention.

15 I will then respond as promptly as possible
16 either in writing or by having you return to the
17 courtroom so that I can address you orally. I
18 caution you, however, with regard to any message or
19 question you might send, that you should never state
20 or specify how the jury stands numerically or
21 otherwise.

22 Members of the jury, you will now hear argument
23 of the lawyers.

24 MR. SEGAL: Good morning, everyone. Your

6347

1 Honor, may I approach, please?

2 THE COURT: Sure.

3 (At sidebar:)

4 MR. SEGAL: In case I lose track, will you let
5 me know when it's 10:25, because I don't normally
6 look at my watch.

7 THE COURT: Do you want to take a break now, or
8 do you want to continue --

9 MR. SEGAL: I'm happy to go right now.

10 THE COURT: Okay.

11 (In open court, jury present)

12 THE COURT: So that there will be no
13 misunderstanding, what we will do is, Mr. Segal will
14 begin and then, approximately about 25 after, we
15 will take our typical break.

16 We will try to do it at a time that doesn't
17 unduly interrupt the flow of the closing argument.

18 MR. SEGAL: Thanks, Judge.

19 I thought what we would do, since my evidence
20 came in almost two months ago now, we would go ahead
21 and reread all the documents.

22 See, you have gotten to know us.

23 I want to thank you all very much on behalf of
24 my team, who I am very proud of, and the 250,000

1 folks or thereabouts that I represent. I realize
 2 this has been a very long road, and I really do
 3 appreciate everything you have done.

4 One of the things I like to do in addition to
 5 thanking you is to share something with you. As you
 6 can tell from some of the examinations in this case,
 7 I have done a few long trials in my career.

8 And one of the things that I usually share with
 9 jurors at the end of this long road is a letter that
 10 Winston Churchill wrote a long time ago. And he
 11 wrote it to his wife, and it is so long ago you
 12 will note when I read you this letter there were no
 13 women on the jury. That's how long ago it was
 14 written. But here is what he said.

15 A most curious system for settling
 16 disputes between private citizens has been
 17 created in America. Men from diverse
 18 backgrounds and persuasions are summoned to the
 19 county seat by an official document.

20 They converge on the county courthouse
 21 sharing but one trait: Equal but total
 22 ignorance of why they are there and what they
 23 are about to be asked to do.

24 A Judge who appears to be cut from the

1 same cloth as the lawyers but wears a black
 2 robe calls the role of the citizens. The Judge
 3 asks a series of personal questions of these
 4 citizens who, as far as I could tell, still did
 5 not know why they were there.

6 Then the lawyers are unleashed on these
 7 innocent citizens. They ask all sorts of
 8 questions, some of which are, I believe,
 9 impertinent. However, for the first time, I
 10 perceived the task at hand was being revealed.

11 If a citizen knew a lawyer or the parties
 12 in the dispute or was in any way prejudiced, he
 13 was dismissed. He was not chastised, but he
 14 was not allowed the privilege of serving as a
 15 juror.

16 At long last, twelve men were selected.
 17 Their common trait was lack of bias, a lack of
 18 knowledge of the issues, of the parties. Then
 19 they sat for days being bombarded by speeches
 20 by lawyers, then instructions in the law by the
 21 Judge and testimony by witnesses who were not
 22 always impartial, fair or truthful, all without
 23 the twelve being allowed to ask a single
 24 question themselves.

1 After lengthy discussions, the twelve men
 2 retired to a small room. You could hear
 3 exhortation and loud conversation. After
 4 several hours, a knock was heard. The lawyers
 5 tensed and the parties tensed in anticipation.
 6 The twelve men trooped in and announced their
 7 decision.

8 In all, it was a remarkable show, but I
 9 came away convinced that these twelve strangers
 10 to the facts had made the right decision. I
 11 too, as an observer, had no preconceived
 12 notions and, upon sober reflection, I concurred

13 with the decision of the twelve.

14 The twelve men called jurors accepted
15 their inconvenience as a civic responsibility.
16 I am convinced that this system called the jury
17 system is superior to anything we have. What
18 could be fairer?

19 Although I promise not to reread all the
20 documents, I do want to go over -- let's go over a
21 few things. First, I guess the most important thing
22 is your verdict form -- the Judge has the original,
23 this is what it looks like.

24 And it's laid out in questions. The Judge asks

6351

1 questions, and you go through it, and you put
2 checkmarks next to the appropriate answer once you
3 all agree upon it.

4 And if you recall, throughout the trial, I have
5 been using this board with lots of witnesses and all
6 that. And the first thing you are going to note on
7 your verdict form is the Issues 1 and 1,

8 You don't have to worry about that anymore.

9 The Court has ruled as a matter of law that class
10 members, relative to the general population, have
11 been significantly exposed to a proven hazardous
12 substance. That's done. That's the very first
13 thing that's on your form. That's been taken care
14 of by the Court.

15 So the next thing we go right to is tortious
16 conduct of the defendants and remember that, in this
17 phase of the case, the Judge has said previously
18 ordered that the trial of this action be bifurcated
19 or split into two phases.

20 The first phase, which is the phase we are in
21 now, is concerned only with questions concerning the
22 tobacco companies' conduct and whether that conduct
23 was tortious, as well as whether the legal
24 requirements for medical monitoring have been met.

6352

1 And I will get to those in a few minutes.

2 Now, we started this case with the Frank
3 Statement. But there are three ways, as the Court
4 instructed you, three ways to prove tortious
5 conduct.

6 Is this a defective product? Okay? Remember,
7 I told you in the opening, we would prove this
8 running away. The Court just instructed you that
9 the preponderance of the evidence means more likely
10 so than not. Okay.

11 Well, let's look at the evidence. It's real
12 simple. I mean, is the product defective? My
13 goodness, ladies and gentlemen, remember I asked the
14 people the questions about the risk. Will it cause
15 lung cancer -- and everyone agreed, yeah, will it do
16 this stuff to people; right? Is there any benefit?
17 No.

18 It's that simple. Look, Dr. Spagnolo, their
19 witness, when I asked him about the risk, he
20 answered, you will recall, in his testimony he said,
21 you are right, the risk outweighs any benefits that
22 I can think of.

23 Dr. Whidby, Philip Morris' witness who came
24 here, I asked him the same thing, and he said, I

6353

1 think, yes, the risks outweigh the benefits. That's
2 from their own witnesses' mouths.

3 What do the defendants say now? R. J.
4 Reynolds, Dr. deBethizy, you will recall: So what
5 we are communicating to smokers is that there is no
6 safe cigarette.

7 Lorillard, Orlowsky:

8 Are low tar cigarettes in your view any
9 safer to smoke than high tar?

10 Not in my view, no.

11 That's one of the depositions.

12 Whidby, Philip Morris: Have you gotten
13 there, is there any such thing as a safe
14 cigarette?

15 No, sir, there isn't.

16 B&W, Dr. Boyse:

17 Can you say as you sit here today that
18 any design of any cigarette is safe?

19 No, I cannot.

20 Okay. Our company, like other cigarette
21 manufacturers, uses brand descriptors like full
22 flavor, lights, ultralights.

23 This is the web page that you saw where they
24 specifically say, right now, we still don't know

6354

1 whether or not they are safe.

2 So when you talk about is this product
3 reasonably safe, come on, look at this, reasonably
4 safe? I could talk about all the stuff they have
5 done.

6 But the fact is, when you look at reasonable
7 safeness, nonconventional or the new cigarettes,
8 okay, which, by the way, as you will recall, there
9 is no testimony that these things are being sold in
10 West Virginia. They had them in target markets,
11 some for three years. They have had them -- one is
12 going to be open last week or the week before in the
13 target market.

14 But even so, Dr. Lilly: We don't have
15 enough data to say that the Accord cigarette is
16 safe. We have enough data to say it's a step
17 in the right direction, but it's not safe.

18 Dr. Boyse: I think we cannot say that
19 Advance is even a safer product. We don't know
20 that for sure. But we do think it's a step in
21 the right direction.

22 RJR's Dr. deBethizy: In the absence of a
23 consensus of what would constitute a safer
24 cigarette, we are not going to claim that the

6355

1 Eclipse cigarette is safer.

2 Lorillard, there was no evidence that they have
3 even been trying to develop a nonconventional or new
4 cigarette and work with the government to say, yeah,
5 this is it, this is the safer product, we have got
6 it.

7 So my point is, as to a safer product, they
8 want to talk about steps in the right direction. Of
9 course, remember all those steps have all been in
10 the late 1980s, okay, and the 1990s. Back in the
11 '50s, '60s, '70s and '80s while they were selling
12 this stuff, we weren't taking too many steps in the
13 right direction.

14 But the point is in terms of retarding the
15 state of the art, not doing what they should have
16 been doing, not aggressively doing the things they
17 could have done back then, do you realize as you sit
18 here, ladies and gentlemen of the jury, back in the
19 '50s when they made the Frank Statement, they were
20 making filters for cigarettes essentially the same
21 way they are now.

22 They said they have changed the composition of
23 the acetate a little, them crimped some of it a
24 little, but, for all those years, they are still

6356

1 using the same thing.

2 And there is a hundred other examples like that
3 you have heard about the defectiveness. They want
4 to talk about, we tested the additives. Don't
5 forget, when the Lorillard lawyer was showing you
6 the articles, those articles in the '90s said no one
7 has ever published on this before. Nobody has ever
8 done this before.

9 I won't go through all the essentials with you,
10 but I think you will recall there were just tons of
11 them. When we get to willful and wanton, I will
12 talk to you about why that was.

13 Now, the Judge also talked about negligence.
14 The failure to do that which a reasonably prudent
15 company would do. Once again, we ask ourselves: Is
16 it more likely so or not. Okay?

17 And think about it. Think about the '50s, the
18 '60s, the '70s and the early '80s, here, deny the
19 problem. That's number one what you do if you're
20 Lorillard.

21 Is it your view that smoking has been
22 proven to cause lung cancer in any individual?

23 No that's not my view. I don't think
24 that's been proven to cause lung cancer.

6357

1 All right, has it been proven to cause
2 emphysema.

3 I don't believe so.

4 That was the deposition of the CEO Spears in
5 1997. You talk about negligence, the
6 failure -- I mean, the head of the company doesn't
7 even want to admit that they have got a problem in
8 '97.

9 Deny responsibility? Same CEO, in your view as
10 you sit here today on July 24, 1997, Lorillard
11 has never been responsible for the death of any
12 smoker?

13 Not to my knowledge.

14 You have got three to four hundred thousand
15 people a year, depending upon which one of our
16 experts' testimony you want to accept, die of
17 cigarette related conditions, and in '97 this
18 fellow's head is still so deep in the sand, do you
19 think they are really downstairs in the lab trying
20 to do the right thing?

21 Let lawyers control health decisions. '78: We
22 have again abdicated the scientific research
23 direction of management of the industry to the
24 lawyers with virtually no involvement on the part of

6358

1 scientific or the business side -- or the management

2 side of business.

3 In 1996: With this background, remember that
4 cigarette companies in the U.S. had given prime
5 responsibility in the health area to their lawyers.
6 This, you will recall, was that long document that I
7 read you to about the people who came here from
8 England and visited these companies and reported
9 back.

10 If Lorillard were to market NSS, in 1981,
11 which would undoubtedly be safe, we should be
12 aware that any public controversy about this
13 product could jeopardize the company, not just
14 the NSS brand.

15 In other words, what are they saying, and they
16 all say it, and we will go through it here in the
17 next few seconds: Don't admit we have got a problem
18 because, if you do, we might have to do the right
19 thing. So what's our decision always? Don't do the
20 right thing. Don't admit it.

21 And they have never even come up with -- they
22 didn't have any evidence of a safer design.

23 How about American Tobacco? That's the one
24 that's now B&W.

6359

1 Deny the problem. 1980. As far as you are
2 concerned, is the Surgeon General simply wrong
3 in concluding that cigarette smoking causes
4 lung cancer?

5 Dead wrong.

6 You want the negligence to be a simple
7 question? Who was dead wrong?

8 Failure to cooperate with public health:

9 I would like to ignore Dr. Richmond's
10 request for a list of our additives.

11 There is a company that's really trying to do
12 the right thing despite what they said in '54.

13 1970:

14 Biological and medical experimentation is
15 outside the scope of the research department.
16 No research project in this field may be
17 undertaken, nor may any grants for this purpose
18 be made without the written approval of the
19 chairman or the president.

20 That's the letter I showed you that they both
21 signed, said ain't nobody going to do the right
22 thing in this company, not while I'm at the helm.

23 1965: In short, outside research caliber is
24 not high. Competence is a problem, bla, bla, bla.

6360

1 And they are talking MCV. This is the Medical
2 College of Virginia. This was the Brown-Jordan
3 memo. It was a long document.

4 Once again, what's the document prove, though?
5 I'm sorry it's so long, but what's it prove as to
6 negligence? What it proves is, we are not going to
7 admit that we have got a problem. We are going to
8 deny that because, if we do the right thing and
9 start making them a little bit safer, step by step
10 by step by step, then people are going to say, well,
11 you should have been doing that all along. So the
12 answer is don't do anything.

13 And indeed they didn't.

14 Reynolds, the folks who make Camels. That's

15 the one where, remember, as long as you don't mess
16 up this product line, okay, in the '80s, at least
17 they let -- or the '90s, you will recall the
18 testimony, but they let some people work on Eclipse
19 and the new cigarettes but don't ever get in a
20 market that might affect us being able to sell
21 these; right?

22 As long as we can sell our deadly cigarettes,
23 as long as we can increase market share, it's okay.
24 We will give you some money to do some research.

6361

1 But we ain't going to do anything about these. We
2 aren't going to incorporate -- in fact, what was
3 stewardship?

4 Stewardship is how you keep the status quo.
5 Make sure they are not any more dangerous. Well,
6 what's that got to do without being negligent and
7 making them less dangerous.

8 '84. It is not known whether cigarettes cause
9 cancer. Once again, we have got a deny, deny,
10 deny. RJR has always regarded the idea of
11 developing a safe cigarette as being based on an
12 unfounded assumptions; to wit, current cigarettes
13 are unsafe:

14 Any research program which has as its
15 goal the development of a safer cigarette is,
16 in our judgment, proceeding on a faulty
17 premise.

18 Because we are going to deny our cigarettes are
19 -- in-house biological testing and the smoking and
20 health area has been terminated, 1970. Did they do
21 some later on, sure, they did some later on, okay.
22 RJR research director, DiMarco found twenty years of
23 neglect and inattention. Good but unchallenged
24 R&D.

6362

1 By the way, did you ever ask yourself, I wonder
2 why they brought deBethizy to talk about stewardship
3 instead of DiMarco. Remember the one when deBethizy
4 was kind of smiling on the stand where I showed him
5 those memos that DiMarco said, if you lawyers don't
6 let me do what I'm going to do, I'm going to get a
7 second opinion. DeBethizy admitted this was the man
8 who forced, through his leadership, the design of
9 the safer cigarette that they have been working on.

10 Once again, I said, product stewardship, as
11 long as you don't stop us from selling this, we
12 won't make -- we will promise you we won't make them
13 any more toxic.

14 And then -- oh, talk about negligence. The
15 introduction of Camel Wides and Kamel Red. Now, he
16 talked about all of the testing they did. Of
17 course, they didn't do it until the '80s and the
18 '90s.

19 But two things I want you to remember about
20 that. They ran one Ames test on the wide brands,
21 one Ames test. But if you will recall, Brown &
22 Williamson scientists came here and said they ran
23 two. Not just the Ames test.

24 They actually ran three. And two of the three

6363

1 proved that these things are more dangerous because
2 of the wider circumference, and they have in their

3 own files the Canadian company's research that
4 showed indeed.

5 So the only person who had a single Ames test
6 that says these things were any safer was the
7 company that wanted to sell them. And these,
8 recall, if you will, why did they want to get these
9 in the market? Because they were safer? Because
10 they incorporated good designs?

11 No. They wanted to go after the young adult
12 urban population. That's who they -- the 20 to 29
13 year old group was the group that they wanted to
14 sell these to in the urban population.

15 You recall I read you the memo who I was
16 introducing them for. That's what they are
17 interested in doing. Sure, they are going to do
18 some tests.

19 And by the way, let us not forget the 1995 test
20 where they did all the Ames tests, that had nothing
21 to do with testing the safety of these products.
22 Remember what Dr. Steele said about the reason for
23 her tests? They did it to see if the reference
24 cigarette was indeed a good reference. That was the

6364

1 only purpose of that test.

2 Think about it for a minute. Nowhere in
3 Steele's published literature did they list the
4 products that she tested. We got it later in '98,
5 but in the test, there was no list.

6 And secondly, right in the beginning of the
7 test, what did Dr. Steele say? We are doing it to
8 see if the reference cigarette is indeed a good
9 reference.

10 Sorry, my mouth is just a little dry this
11 morning.

12 What did they test? Consistently what did they
13 test? Think about that in the 50's, the '60s, the
14 '70s, the '80s, okay. Almost never, never would
15 they test the actual product they were going to sell
16 to the consumer. Almost never did they do that.

17 Two, when they funded CTR, what did the CTR
18 director say when he got here? We didn't do tests
19 on the actual products. We couldn't do tests on the
20 actual products. We were paying scientists to do
21 scientific studies, but not with the actual
22 products.

23 What tests did they use? Well, they all
24 admitted once the Ames test became available in the

6365

1 '70s, some of them started to use it, although the
2 first time you all ever saw it used on a wide scale
3 basis was Steele in '95; okay?

4 But there were over the years lots of different
5 ways. Remember the R. J. Reynolds chart that I
6 showed you where in one decade they might have
7 tested twelve brands, in the next decade they might
8 have tested fifteen? It was RJR's lawyers on the
9 chart that they used with deBethizy.

10 If you want to make something, if you want to
11 fulfill your obligation, you have got to work at it,
12 folks. You have got to try.

13 And last but not least, here is my favorite in
14 terms of negligence. How did testing result in
15 positive changes to these things?

16 As long as you don't stop us from selling
17 these, we will keep working on some changes for some
18 lesser brands. Of course, we don't do much to
19 market those. We keep them in test markets for
20 three years in some cases, even though as long as
21 you will let us put our new Blue on the market, our
22 new menthol, we will get that to market in Atlanta
23 and Pittsburgh in six months, I think, you will
24 recall that the document which I showed you that

6366

1 started in -- it was about six months. You recall I
2 showed that to Dr. Lilly and he said, yeah, that's
3 right. Meanwhile their, quote, safer product is
4 still stuck in -- more than three years now it's
5 been.

6 Finally, if you want to talk about -- the
7 Reynolds people wanted to talk about what a great
8 job they are doing, and I think deBethizy genuinely
9 believes he has done some good work, and I don't
10 doubt he has done some good work. But the company
11 itself, Reynolds, has already reduced from eight
12 hundred people its R&D to four hundred, and then
13 gone from a budget of 113 million to 58 million.
14 That's how much they care about doing the right
15 thing.

16 Philip Morris. As long as we can sell our
17 Marlboros.

18 1971, we do not believe that cigarettes are
19 hazardous.

20 2000, this is the letter you saw from the
21 lawyer to the FCC, someone had written in and said
22 what are you going to do about your unsafe --
23 Mr. Neuhauser's letter mischaracterizes the
24 company's web site as constituting a public

6367

1 admission that cigarettes cause illness. It does
2 not.

3 No comparative brand testing. You remember
4 Dr. Whidby agreed with me, they never comparatively
5 tested all the different products.

6 Dr. Osdene, ship all documents to Cologne.
7 Keep it in clone. It's okay to phone me and telex
8 and I will destroy it.

9 Threaten to clobber Liggett if marketed
10 palladium cigarette.

11 Let me talk to you about that for just one
12 moment, if I can. Do you recall we brought an
13 ethicist here to talk about how companies do and
14 don't do the right thing? He's from one of the
15 leading business schools in the country, the Wharton
16 School in Philly? And do you recall the
17 questioning? I am done with that guy because he
18 doesn't know enough about palladium.

19 Here is the problem that they still don't get
20 with palladium at Philip Morris. The problem isn't
21 that it may not have been the solution. The problem
22 isn't that it may not have tested out to be the
23 all-time breakthrough. The problem is that the way
24 they went after it was to say we are going to crush

6368

1 you for even trying. That's the problem.

2 Auerbach, they want to argue about Auerbach
3 even though their initial scientists who looked at

4 those slides said, dang, it looks like Auerbach did
5 it. Why weren't they there? Why weren't they
6 saying we have got to replicate this, we have to
7 work with Dr. Auerbach, we have got to support the
8 scientific community and help this guy, he may have
9 answered our question.

10 Well, they can't do that because they can't
11 deny, deny, deny. So they don't do it and they bash
12 the guy.

13 And by the way, last but not least when we are
14 talking about the ethicist and the principles, where
15 is their guy from Harvard? If he wanted them to go
16 read all them depositions, if he wanted them to say
17 they were a good company, how come they couldn't?
18 Philip Morris, the folks who make these, how come
19 they couldn't find someone at Harvard or Columbia to
20 read their documents, read their depos and say, no,
21 it's okay to behave that way?

22 We are working to be in a position to design a
23 cigarette which will meet the less hazardous
24 specifications if they are ever imposed. That's

6369

1 clear back in '73. And recall what happened? It
2 was Dr. Lilly. I really liked him. He was a cool
3 guy. Do you remember what Dr. Lilly said? It
4 wasn't until 1987 when the guys in the sky made the
5 phone call and said get to work on it. And that was
6 when they really got to work on it is when the guys
7 in the sky in New York called down, the very day
8 that RJR publicly announced -- and by the way, where
9 does he think RJR got that idea? It was
10 Philip Morris' own patents which they improved
11 upon.

12 And then in 2000, the Marlboro Milds, the
13 cigarette which you will recall I showed you that
14 chart, it's not the most -- it's not quite as bad in
15 tar as these, but it's second only to those. 2000.

16 And if you think about this evidence, what you
17 will always find is that as long as Philip Morris
18 could take care of this family, sure, they would
19 spend some money in '87, '88 and '89, make steps in
20 the right direction, but the boys in the sky never
21 wanted them, never once would do anything.

22 Do you remember Dr. Lilly's face? The Judge is
23 giving you an instruction on weighing the
24 credibility of the witnesses and how you can take --

6370

1 do you recall the look on his face when I asked him
2 has the company and the marketing people ever talked
3 to you all about calling the new cigarette Marlboro
4 2s, the next generation? Recall that.

5 What else do we know about Philip Morris? We
6 had all those documents, all of those documents.
7 Did you do research offshore to hide your results?
8 I'm not going -- destroy documents? Dr. Osdene, did
9 you -- avoid new tests for carcinogenicity?

10 Remember how they all kept saying, well, we
11 couldn't do Ames testing till the mid '70s because
12 it hadn't invented it yet. Fine. Where in the
13 Judge's instructions does it say they are allowed to
14 sit around and wait for the world to come to them
15 while they continue to sell these deadly products?
16 You won't find that in the instructions.

17 Set up dummy mailing addresses? All that. I'm
18 not answering that, no way.
19 By the way, one last thing, as we leave
20 Philip Morris and gone to Brown & Williamson's
21 failure to do what a reasonably prudent company
22 would do, with all the things that Philip Morris,
23 all those documents which we brought you -- and I'm
24 sorry you had to sit through, but now you see why

6371

1 it's so important.

2 With all that evidence, where were the guys in
3 the sky? Why are we meeting people like Whidby and
4 Lilly, who, yeah, they tried to make some changes.
5 Of course, Dr. Lilly, remember, the day he got there
6 was the same day Dr. Farone got there.

7 And please don't forget that Lilly also said
8 Farone was a good scientist, a good boss. They
9 started the stewardship program together, bringing
10 in more scientists.

11 When he said that I couldn't believe it. I
12 waited for this moment when Dr. Lilly said we
13 brought in visiting scientists to Visiting
14 Scientists Program.

15 Why? Remember I asked him why? Because we
16 didn't have enough at Philip Morris. They want to
17 talk about I'm saying they have to throw money at
18 problems. Dr. Lilly admitted to you they had to
19 bring in scientists to talk about the state of the
20 art.

21 But, oh, we never see the people in the sky in
22 New York. We never see in the face of Dr. Osdene
23 and the things he wrote, the explanation from the
24 people in New York. Why weren't they in that stand

6372

1 so I could talk to them?

2 THE COURT: Mr. Segal, you are now at Brown &
3 Williamson?

4 MR. SEGAL: I've don Philip Morris, and I'm at
5 Brown & Williamson, and it's a great time.

6 THE COURT: Why don't we take a break now.

7 MR. SEGAL: All right, Judge.

8 (A recess is taken.)

9 (In open court with a jury present.)

10 THE COURT: All right. Be seated, please.

11 Mr. Segal?

12 MR. SEGAL: Thank you, Your Honor.

13 I was told to slow down a little bit so people
14 will have half a chance to understand what you are
15 saying. But I don't want to bore you, I'm just
16 trying to remind you of a lot of testimony and
17 especially a lot of documents

18 And I don't know if you realize this, but all
19 those documents, they go with you to the jury room.
20 So if you think I'm not saying something just right,
21 I mean, you will have them all back there along with
22 the law to see what all has been proven.

23 Now, Brown & Williamson. Let's talk about what
24 the Brown & Williamson folks.

6373

1 Dr. Sanford, Brown & Williamson did not do any
2 biological testing in house? Is that correct?

3 Correct.

4 '77, once again, you have got to deny, deny,

5 deny so you can keep selling these. We don't think
6 it's a question of a safer cigarette. We think all
7 of our cigarettes are safe because there is no
8 documented evidence whatsoever that indicates a
9 cause-and-effect relationship between smoking and
10 disease. That's 1977 that they are saying they
11 don't think these things cause disease.

12 We asked Dr. Tucker, how many people out of 70
13 million would die before you would conclude
14 that the product wasn't safe?

15 Oh, I would say better than 50 percent.

16 Destruction of unfavorable research. If
17 company testing began to show adverse results
18 pertaining to a particular additive, the control
19 would unable the company to terminate the research,
20 remove the additive and destroy the data.

21 1981, Peoples, chief counsel, Peoples said he
22 was 100 percent certain that it was inadvisable to
23 have a medically qualified employee in our control.

24 Why?

6374

1 Why wouldn't you want to have someone who could
2 tell you about something of the safety hazards of
3 these? Because, if subpoenaed, he would have to
4 stand by his professional ethics and speak against
5 the industry.

6 Finally, B&W believed in the Liggett palladium
7 project was the dumbest project that it had ever
8 seen, and it was going to ruin the industry. And by
9 the way, remember one last thing about palladium
10 because what they want to say is, it wasn't proven
11 to be safe, it was a heavy metal, bla, bla, bla,

12 We don't need to listen to the evidence. Here
13 is the point: One of the safer cigarettes you heard
14 about in this case, what did they put in the filter
15 to make it safer? It wasn't palladium, but it was
16 an aluminum.

17 Remember, they said we had to get a certain
18 alloy that the government gave us to create what we
19 have now created? I guess it wasn't such a bad idea
20 after all.

21 Maybe it wasn't the one that would have proven
22 to be right, maybe it wasn't 100 percent. But why
23 weren't they talking about this is a grand idea? It
24 may not be perfect, but let's start working on it.

6375

1 Because you have got to deny, deny, deny so you can
2 keep selling, selling, selling.

3 Let's build a wall called the Atlantic ocean
4 between our research and our company. We will put
5 that ocean between them, we will build a brick wall
6 on the ocean, and we will make sure that it can't
7 hurt us.

8 '86, if it ever came out in a U.S. Court
9 case that Brown & Williamson had deliberately
10 pursued a policy of burying its head in the sand
11 and cutting itself off from work done in the
12 back room, one would only believe this would be
13 enormously damaging. We are here.

14 1983. Until guidelines are issued, any
15 contact between GR&DC and B&W should be by
16 telephone. Two possibilities being considered
17 are do not access the -- to not assess the

18 biological activity of commercial U.S. products
19 but use representative blends. Use the
20 commercial products but keep all results in
21 Southampton.
22 Okay? Don't let anyone say to you I don't
23 think a reference cigarette is something good.
24 A reference cigarette has a very legitimate use

6376

1 in biological testing and in cigarette testing. Our
2 evidence wasn't that. The problem is you can't use
3 it to hide what your real products are doing to real
4 human beings at the rate of three to four hundred
5 thousand people a year.

6 That's the misuse.

7 In light of B&W's -- in light of this,
8 B&W's position is that research into product
9 modification, biological activity, carbon
10 monoxide, et cetera, should not be done because
11 discovery of such research would prejudice
12 B&W's chances of defending litigation.

13 B&W RD&E is interested in work dealing
14 with smoke reduction, but it's not interested
15 in the biological testing of the products
16 produced. David will explain this to Alan
17 Heard and ask whether the projects could be run
18 without biological testing.

19 Now, can a company claim it did what a
20 reasonably prudent company should do in light of
21 what these people are doing? And remember, these
22 aren't one or two or three or ten or twenty or four
23 hundred guys, men in women in the lab; these are
24 people making decisions.

6377

1 I would also -- as we go on to the assumed
2 responsibility, the Judge told you people can
3 promise to do something, and that's the third level
4 of tortious conduct is how they violated the Frank
5 Statement.

6 The first thing in the Frank Statement is, We
7 accept an interest in people's health as a basic
8 responsibility paramount to every other
9 consideration in our business. I'm not going to go
10 back over all that because how can you, with a
11 straight face, claim you ever cared about people's
12 health as a basic responsibility when, yeah, you
13 have got a few scientists in the late '80s and '90s
14 who are going some work, but it's clear, in the 50s,
15 '60s, '70s, you have got to keep this ball rolling?

16 So let's skip right to, We always have and
17 always will cooperate closely with those whose
18 responsibility is for public health.

19 Well, I brought you the Surgeon General. I
20 guess they couldn't find one to say that they
21 cooperated with him or her. But we actually had
22 Dr. Richmond here, free of charge, to come and tell
23 us did they cooperate.

24 And I think you will recall that I asked him,

6378

1 My question to you is: While you were Surgeon
2 General of the United States, Dr. Richmond, did
3 the tobacco companies always work, cooperate
4 closely with you, Doctor, in safeguarding the
5 public health?

6 No, they did not.

7 Well, did we see why not? Sure, we did.

8 Ms. Gina -- well, yeah, Ms. Gina, would you get 250
9 ready and, when I take this down, demonstrative 250,
10 please?

11 The tobacco industry, what did they really
12 think inside, the guys in the sky? Philip Morris:

13 Meanwhile the industry continue its
14 policy of vigorous denial.

15 Those aren't my words, folks. These are words
16 on a document, 9645, in evidence in your jury room.
17 I did not make those words up, "vigorous denial."
18 Finds itself in the role of a bad boy in opposition
19 to the forces ostensibly dedicated to the welfare of
20 the people.

21 Ostensibly dedicated? Small mistakes? Small
22 miss statements? Federal agencies like FTC, NIH,
23 USDA, cancer research institutes like Sloan-
24 Kettering, Roswell Park, the Tobacco Institute, we

6379

1 have had a full-time job jousting with HEW and the
2 FTC and the FCC. They think it's a fencing match.

3 B&W, the adversaries list, when -- remember I
4 showed you the adversaries list. Look at people
5 they are calling their adversaries.

6 '83, I suppose one does begin with the
7 fact -- I suppose one does begin with the fact
8 that our adversaries are well organized and
9 sufficiently funded. Between our three main
10 opponents, the American Lung Association,
11 American Cancer Society and American Heart
12 Association, they have more than six thousand
13 full-time employees.

14 That's the way these companies -- now, let me
15 ask you something. When you wonder why there is no
16 safer cigarette out there, think about it for a
17 minute. Remember when I asked their scientists:
18 Did you ever sit down when you agreed in '54 to
19 cooperate with public health?

20 Oh, Dr. Wildner told us to reduce tar and
21 Dr. So-and-so told us -- public health said reduce
22 tar, so that's what we started to do.

23 Did they ever go out and see if it was
24 working? Did they ever themselves say, you know,

6380

1 they may think that's the right answer, but we
2 better test that theory? They never did. They
3 never sat down with government. They never really
4 took the effort. Ms. Gina, put up 250 for me,
5 please.

6 1963: Any description in the letter to
7 the Surgeon General's committee of the research
8 programs conducted by B&W must necessarily be
9 so vague and incomplete as to be irksome to the
10 reader. It is unfortunate that B&W must submit
11 anything, but this approach seems to me to be
12 the most innocuous.

13 And you will recall what they were trying to do
14 was they didn't want to give the Surgeon General
15 appropriate information about what's contained in
16 their products.

17 RJR's Dr. Colby: Do you recall describing the
18 Surgeon General of the United States as an

19 enemy of R. J. Reynolds? This was in a
20 deposition you heard.
21 Of course.
22 The Food and Drug Administration?
23 Yes.
24 How cooperative do you think this chap would

6381

1 have been?

2 Dr. Farone: Lorillard's submission of
3 materials to the Surgeon General in 1963 was
4 not an example of cooperation.

5 Thank you, Ms. Gina. Do you recall I showed
6 that to him and asked him that very question.

7 Now, we know how hostile they were. So what's
8 their comeback going to be? Well, what they are
9 going to say is, well, yeah, we never really sat
10 down, we never talked.

11 Is it any surprise, ladies and gentlemen, they
12 did this work in the '90s, but they haven't met and
13 really tested and sat down with the government to
14 get to a point?

15 I mean, there has been forty years of lost
16 opportunities. And they will say, well, we went to
17 the Tobacco Working Group. We worked with the
18 government on that, and it's the government's
19 fault.

20 They shut it down. Remember two very important
21 things about the Tobacco Working Group. First,
22 everybody who showed up said, number one, I don't
23 agree with you that cigarettes are unsafe. I don't
24 agree we have got a problem. Deny, deny, deny,

6382

1 deny, got to keep selling those killers. We have
2 got to keep selling cigarettes to kill people. But
3 we will show up, but, when we show up, we don't
4 agree they are unsafe and, two, we won't show up as
5 a company representative.

6 Research directors were serving in their
7 individual capacities and not as representatives of
8 their companies or the tobacco industry.

9 Those documents are in your jury room.

10 Research directors did not accept the premise
11 that cigarettes are hazardous or that cigarettes
12 cause disease. Those are all the letters from those
13 research directors that I published for you to see
14 what they were saying.

15 They oppose comparative commercial brand safety
16 testing by the Tobacco Working Group. That was the
17 document where the head of the group, DiMarco, it
18 was talking about the fact that he didn't think
19 there was any way that those folks would ever allow
20 him to comparatively test the actual products that
21 were being sold to people.

22 TWG head Dr. Gio Gori was under fire by the NCI
23 because he's too close to the tobacco industry, and
24 indeed the evidence was, after that was closed down,

6383

1 he became a consultant to them.

2 And they say, well, we are going to spend money
3 doing research. That's what we are going to do. We
4 are going to fund the CTR. Now, the CTR kind of
5 wears two hats depending on who you are listening
6 to.

7 When you listen to the CTR scientist, he says
8 it was an organization doing good research using
9 good science activities. But if you look at the
10 tobacco description, the companies in house, it was
11 a shield. The market.

12 But here is what it all gets down to. Do you
13 realize, when they are talking about this being the
14 link to smoking and health, the two critical things
15 you have got to realize are, number one, this isn't
16 what the CTR was doing research on.

17 And two, although they did have a lot of good
18 scientists, they only had eleven hundred projects.
19 During their whole existence, it only had eleven
20 hundred projects.

21 And when you look at what those good scientists
22 did, and I'm not fussing it wasn't good, but was it
23 relevant? Did it help answer the question? They
24 got six to seven thousand papers out of those eleven

6384

1 hundred projects; less than 5 percent wound up even
2 being mentioned in the Surgeon General's report.

3 And more importantly, we know why they weren't
4 getting closer to the real answer, because the
5 people funding them, here is what they thought of
6 them. Public relations, best, cheapest insurance,
7 political and public, our shield, useful to launder
8 money, that's what they thought of them.

9 Look at what they said in their own words.
10 Projects which are not related directly to smoking
11 and lung cancer. That's why they kept funding
12 them. Projects of no more remote relevance to
13 current problems, CTR did virtually no useful work
14 and cost a vast amount of money.

15 Those aren't my words. Those are the actual
16 documents you have in the jury room.

17 But what's the most shameful thing about it?
18 Do you recall when I asked Dr. Farone and then I
19 asked some of the corporate people about what a
20 penny, a penny a cigarette? Do you recall I asked
21 Dr. Whidby from Philip Morris?

22 They never got a letter that they were supposed
23 to cooperate with these people. They never got a
24 letter that said put the health of our consumers

6385

1 paramount. They never got those directives. And
2 look, down here is their CTR expenditure.

3 Now, they have an absolute, absolute First
4 Amendment right to advertise all they want. No
5 problem. But they have a legal duty to make sure
6 that the products that they are selling meet the
7 obligations, the promises, that they made in 1954.
8 And I think it's pretty darn clear they weren't
9 doing that.

10 And so for those reasons, when you go back to
11 your jury room and ask yourselves is it more likely
12 so based upon the evidence that they engaged in
13 tortious conduct, I think there is three clear
14 categories of proof in this case for you to so find.

15 Next we have to talk about is it a proximate
16 result -- the jury charge, what did I do with it?
17 So we have gone over product defect, we have gone
18 over negligence, we have gone over the breach of the
19 undertaking that they said they would do and they

20 never did, we get to increased risk. Okay?
21 So as a proximate result of the exposure --
22 obviously to cigarette smoke -- the class members
23 have suffered an increased risk of contracting a
24 serious latent disease.

6386

1 And I don't think there is much argument that
2 lung cancer, COPD and emphysema are very serious
3 diseases, and they are latent diseases. In other
4 words, they exist and you don't know it, and then
5 they become problematical and hopefully you find
6 out. So who did we bring?

7 Gaziano, someone who has taken care of people
8 in this state, treats human beings for these
9 conditions; Dr. Richmond, the former Surgeon
10 General; Dr. Burns, who worked on 18 of the Surgeon
11 General's reports, a pulmonologist, someone
12 responsible for people with COPD and lung cancer;
13 and Dr. Gupta who works in a specific program to
14 detect lung cancer at the West Virginia University
15 Medical School.

16 Compare that with, for instance, Dr. Goodman,
17 who wouldn't even show up at the thoracic society
18 meeting and admitted it to you, admitted he wouldn't
19 show up, makes eighty to a hundred thousand dollars
20 in one case; Dr. Spagnolo, I will let you all decide
21 that for yourself; and Dr. Louria. Very interesting
22 Dr. Louria because what was interesting about him is
23 he comes here and says my program is the best
24 program. I have the number one program.

6387

1 But he admits, in New Jersey, in Newark, if you
2 have been exposed to a toxic substance, lead, even
3 though it causes an irreversible condition, you get
4 medically monitored for it. And he admits that, if
5 you were exposed to the toxin Pondimin or Redux, you
6 get medically monitored for that.

7 But let's look at the other testimony in this
8 regard.

9 The class must demonstrate -- the class must
10 demonstrate that all class members have an increased
11 risk of contracting lung cancer, COPD, or emphysema
12 relative to what would be the case in the absence of
13 their smoking; however, no particular level of
14 quantification of the risk is necessary to satisfy
15 this requirement.

16 It has to be a risk. So be careful when they
17 show you questions and answers and they have
18 inserted words like "statistical," or "significant,"
19 because, when you go back and look at the Judge's
20 charge on Page 20 -- i'm pretty sure it's Page 20 --
21 you won't find those words in the charge.

22 Let me double-check the page and make sure I
23 have got it right. Yeah, twenty. Page 20, you
24 won't find the words they slip in their questions.

6388

1 But Dr. Burns: And the place where that risk
2 climbs above one is approximately at five pack years
3 and, therefore, that's one way to define a
4 significant meaningful exposure for your risk of
5 developing lung cancer.

6 The people above this level would be at an
7 increased risk. Now, I'm going to talk about that

8 in a minute, but my point here is: Remember, by the
9 time you get to this increased risk, you have
10 already smoked 36,500 cigarettes based upon the
11 testimony in this case. 36,500 cigarettes.

12 Dr. Gaziano: People who smoke cigarettes --
13 this is a question. Are people who smoke
14 cigarettes over a period of time at an
15 increased risk of developing COPD?
16 Yes, sir.

17 Spagnolo, he's the one that wanted to go five
18 years, six, years, seven, eight, nine, ten
19 years be. And he goes, no, I don't think it's
20 there, I don't think it's there. Cigarette
21 smoking is a risk certainly. I tell my
22 patients to stop smoking because it's a risk
23 factor.
24 In other words, he has to admit, although he

6389

1 wants to fuss about how many; every time you smoke a
2 cigarette, that risk goes up and up and up. The
3 risk actually begins when you smoke the first one.
4 But by the time you get to 36,500, that's when it
5 becomes an increased risk of contracting the
6 diseases.

7 Dr. Goodman: Let me ask you, do you stand by
8 the statement or don't you that there is a
9 significantly higher risk of dying from lung
10 cancer in people who smoke cigarettes?

11 This is a doctor who claims to be an expert and
12 who actually wrote -- remember I showed you that
13 article where he wrote a sentence that talked about
14 risk and miraculously the sentence is gone now?

15 Look at what happened the first time I asked
16 him that question. Ms. Gina, put up 266, please.

17 I think you will recall that the first time I
18 asked him during his cross-examination, I think you
19 will recall, I said:

20 And scientifically, the fact that smokers
21 have a significantly higher risk of dying from
22 this disease, that being lung cancer, was a
23 scientifically correct statement at the time,
24 wasn't it?

6390

1 And recall I was showing him his article before
2 that sentence got removed. Actually hadn't appeared
3 in front of you when I was questioning him: I'm not
4 sure.

5 And then finally he admitted, yes, it is a
6 correct statement. The risk is there.

7 Now, I also want to be real careful, although
8 everybody agrees there is a risk when we talk about
9 five years, this is a class action. Don't let them
10 marginalize people at the low end; okay?

11 The law says is there a risk. Now, sure, the
12 people at the low end is where the risk begins.
13 This class is comprised of people with five, six,
14 seven, eight, twenty, forty, sixty years of
15 exposure, some of whom have quit, some of whom have
16 not.

17 But don't let them act like there is no risk.
18 Don't let them marginalize people out of this class
19 because what you have to do is exactly what -- the
20 only person who has written surgeon generals'

21 reports and edited, the only expert in this case who
22 has been involved not only in 18 but even in one
23 surgeon general's report, said is, well, you can't,
24 obviously wait until people start developing

6391

1 disease. It's too late. What you have to do is you
2 have to early detect it.

3 No. 6. That's what you are trying to do is
4 early detect them. And so he looked back at where
5 the risk begins. If they want to talk about
6 mortality, mortality isn't going to help because, if
7 people are already dying of the condition, we waited
8 too long. And that's not what the law requires.

9 Do they remain at risk? Well, you recall all
10 that. Dr. Gaziano said it never goes back to zero,
11 Dr. Burns said it never goes back to zero. When you
12 quit, yes, it certainly does reduce the risk. The
13 problem is it doesn't eliminate it.

14 And finally what it won't do is quitting won't
15 early detect anything. It's not a substitute. It
16 was undisputed that the former smokers' risk of lung
17 cancer never goes back to that of a never-smoker, it
18 is undisputed there are now more former smokers
19 being diagnosed with lung cancer than current
20 smokers, and it's undisputed that quitting smoking
21 does not early detect lung cancer and COPD.

22 So I think with regards to that, it's pretty
23 clear based on everybody's testimony that the
24 members of the class are at an increased risk.

6392

1 And we have got to capture them all. That's
2 really important. And what do we propose we do?
3 Once you have got the risk, then you have to look
4 at, well, when does the disease get to its earliest
5 detection stage because what we want to do is -- say
6 is does the increased risk of disease make it
7 reasonably necessary for the class members to
8 undergo periodic diagnostic medical exams different
9 from what would be prescribed in the absence of the
10 exposure?

11 And obviously no doctor testified that
12 spirometry or CT scans should be given to people who
13 have not been exposed to cigarette smoke unless
14 there is some other underlying problem.

15 But based upon the general population, these
16 are the special tests that hopefully will catch it
17 early. And at age 40 and 45 is when spirometry
18 begins because what you are looking for is those
19 changes in the small airways. That's where you want
20 to find out if the person has it, and 50 for lung
21 cancer; okay?

22 Now, did we prove it's reasonably necessary?
23 Unpaid, unpaid former Surgeon General, I think you
24 will recall I asked:

6393

1 Doctor, is there any reason based upon
2 your training and experience in public health
3 that, in West Virginia, okay, we cannot go
4 forward and medically monitor people who have
5 been exposed to cigarette smoke for more than
6 five years?

7 I think you will recall I asked Dr. Richmond
8 that, and I think you will recall he said:

9 No, I don't believe there is any basis
10 not to go forward with them.
11 He wasn't making a hundred thousand dollars; he
12 wasn't getting paid five thousand dollars a day.

13 And then I asked:

14 Is early detection one of the most
15 important things in public health other than
16 prevention?

17 Yes, because that's our only hope to
18 reduce the mortality for those who have been
19 smokers.

20 That's our only hope.

21 And why is it our only hope? This isn't some
22 crazy idea.

23 Goodman: It's better -- I think you will
24 recall I asked him: Is it better to find lung

6394

1 cancer at an earlier stage?

2 Even their expert admits it is correct that
3 finding cancers at Stage 1 is better than finding
4 them at Stage 3.

5 Harmon McAllister, this was the fellow they put
6 up there to say the CTRs research was so good,
7 that's who Dr. McAllister was. He said he worked
8 with great scientist. I said:

9 So let's show the jury your 1957 research
10 study that you all paid for with these great
11 scientists. What did he say? Were those
12 doctors essentially saying back in 1957, if you
13 can detect lung cancers early, you may be able
14 to find a cure or will more easily cure the
15 patient?

16 Sure, as has long been recognized.

17 Everybody knows this.

18 Dr. Louria, any cancer is easier to treat when
19 it's localized. Remember, in his own book, there is
20 then a tremendous difference in outcome if the tumor
21 is localized at the time of discovery, and this is
22 true even for cancers with a terrible overall
23 outcome. That was their expert's own writing which
24 I showed you.

6395

1 When it comes to mortality, first of all, look
2 at your instructions, Page 23; okay? You can
3 consider will it help survivability, will it help
4 early detection, but you will not find what the
5 tobacco industry wants; that mortality is an
6 absolute.

7 And you know why? Think about it. Louria, he
8 recommended, their expert recommended mammography
9 for women under 50 before mortality was available.
10 So did the National Cancer Society recommend it,
11 before the data was in.

12 And I don't know how he gets mortality data for
13 back exercises and all that, but the point is, with
14 regards to the prostate cancer, mammography for
15 women, all that stuff, lots of that was introduced
16 before, and there is no instruction that says you
17 must reduce mortality.

18 We have got a chance here, folks, based upon
19 the testimony of the experts, to do something which
20 has never been done before. Even the American
21 Cancer Society guidelines that they all want to talk

22 about says it should be emphasized that there are
23 few instances where gold standard data, more data,
24 are available to provide a clear and unambiguous,

6396

1 let alone, unassailable basis for public health
2 policy.

3 Now, think about the evidence that you have
4 heard. The evidence about -- I mean, I bored you to
5 tears with the -- remember, we went through the Mayo
6 study and the fact that people survived longer, the
7 fact we asked Dr. Richmond:

8 Dr. Richmond, do you think the risk of
9 the disease makes it reasonably necessary for
10 folks to receive periodic medical diagnostic
11 testing for lung cancer and COPD and/or
12 emphysema?

13 Yes, I think that's a reasonable thing to
14 do.

15 Can anybody really question that we have proven
16 it's more likely so than not that this is going to
17 help? That it's reasonable?

18 Dr. Gaziano, does that increased risk
19 make it reasonable necessary for folks who have
20 smoked for a period of time to undergo periodic
21 diagnostic medical examinations different from
22 what would be prescribed in the absence of
23 their cigarette smoking history?

24 Yes, sir, I think you will recall he said

6397

1 that.

2 Why?

3 I think it makes sense.

4 You saw the World Health Organization, the
5 National Blood and Lung Institute, you you saw all
6 those papers about former and current smokers
7 needing this. Dr. Burns:

8 Based upon that, do you believe, Doctor,
9 that it's reasonably necessary for the class
10 members to undergo periodic diagnostic medical
11 exams you would prescribe for a nonsmoker?

12 Yes, I do.

13 And why? Why? Well, their doctors wouldn't
14 tell you how many people. But you know why it's
15 reasonably necessary? Is it not more likely so than
16 not that we can make a difference?

17 Running away, we have proved that point.

18 Now, I understand that they want to say it's
19 not reasonable because they had some docs come in
20 and talk about, well, there is going to be
21 overdiagnosis or there is no mortality.

22 I have already talked to you a little bit
23 about, you know, we do the blood test for men for
24 prostate cancer, mammography before -- and by the

6398

1 way, don't forget, they want to talk about the
2 follow-up, it's going to be horrible. None of the
3 tests that they say are recommended to make a
4 diagnosis.

5 These are early detection tests. You will
6 always have to follow them up, and you will see in
7 the Court's instruction that the Court talks about
8 there may need to be full follow-up.

9 But don't, don't for a moment forget, okay,

10 that it is through this exposure that we need to do
11 this for everybody; okay? And most importantly,
12 when we are talking about that and they want to talk
13 about, well, yeah, but, you know, there is no
14 mortality, and there is going to be all these
15 horrible consequences, well, except for one thing.

16 You recall how bored you all got but suffered
17 through the Mayo study, the Sloan-Kettering study,
18 the foreign study -- what was the other one, Sloan-
19 Kettering, Mayo -- oh, Johns Hopkins where they
20 looked at over eighty thousand people to see if the
21 early diagnosis could occur with chest x-ray.

22 Not one complication. Not one -- they couldn't
23 bring an article in here to back up what they were
24 trying to scare you about. Not one article. And

6399

1 Henschke, look at Henschke. They have a specific
2 protocol, not one complication, and meanwhile Louria
3 is willing to get up there and tell you people are
4 going to die.

5 Early detect? So that takes care of five. We
6 have spent enough time on that.

7 Let's get to six and seven, and I need to put
8 that back up for seven. That is why I have to keep
9 putting it in the way. Sorry.

10 Does monitoring procedures exist that make
11 early detection of disease possible? Possible. You
12 will see that in black and white right in the
13 Judge's charge.

14 Well, I asked those questions too, and I think
15 you will recall that you will see in the charge that
16 you have a screening test such as a single low-dose
17 spiral CT scan or spirometry makes early detection
18 of lung cancer and chronic obstructive lung disease
19 or emphysema possible if it allows discovery of
20 latent or hidden signs of these diseases, even
21 though other follow-up procedures are required to
22 actually diagnose these diseases.

23 I said it pretty good from memory. And I asked
24 their expert.

6400

1 Now, it is true, isn't it, that a single
2 spiral CT scan might detect a nodule that, when
3 further diagnostic work up was done, could be
4 shown to be lung cancer; correct?

5 I think you will recall he said:

6 That's correct. The initial CT scan
7 would lead to other forms of evaluation to
8 determine what that evaluation is.

9 I didn't even have to rely on my doctors for
10 that one. Even Spagnolo on spirometry:

11 Can it actually itself, though, detect
12 air-flow obstruction? You can see it on
13 spirometry?

14 Yes.

15 We are talking about possible early detection.
16 Be careful of people using words like "diagnosis" or
17 "symptomatic versus asymptomatic." Early
18 detection. You will recall in the testimony, every
19 one of these, Richmond, Burns, Gaziano, Spagnolo,
20 agreed that early detection is possible using COPD.

21 Additionally, lung cancer? Same thing,
22 Goodman, Louria, Gaziano, Burns, Richmond,

23 Dr. Gaziano, all agree, yes, it's going to make
24 early detection possible. And that's what the Judge
6401

1 has instructed you on.

2 Does everybody agree that this is the new and
3 exciting way we make sure? Look, the National
4 Cancer Institute, Society of Thoracic Radiology --
5 this is the one you recall Dr. Goodman wouldn't even
6 show up at -- American Cancer Society, newer
7 technology: A low-dose CT scan appears to be more
8 promising than conventional chest x-rays for the
9 early detection -- for the early detection of
10 possible disease.

11 Our results confirm the expectation that
12 compared with chest radiography, low-dose CT greatly
13 increases the likelihood of detection of small
14 noncalcified nodules and thus of lung cancer at an
15 earlier and more curable stage.

16 And that's what we are here about. Can we
17 early detect, could we early detect? And why is
18 that so important? Dr. Gaziano, you may recall I
19 asked him:

20 In terms of what doctors have been trying
21 to do vis-a-vis lung cancer for years, as far
22 as helping people with that serious disease, is
23 there anything more important than finding it
24 as early as possible?

6402

1 And I think you will recall he said:

2 No, sir, the studies all indicate that
3 early stage cancer is significantly curable,
4 and more advanced is significantly fatal.

5 Gupta:

6 All right. And if a patient gets lung
7 cancer, is there anything more important than
8 the early detection of the lung cancer?

9 That's the most important thing so far
10 that's been proven to save lives in lung
11 cancer.

12 And why is the early detection through the
13 low-dose CT so critical? You saw it in living
14 color. Now, they want to fuss with me about
15 staging. I carried these three things through this
16 whole trial.

17 They want to fuss with me about staging, but
18 the fact of the matter is that, technologically, we
19 have a chance, and this actual x-ray proves that
20 point running away, that West Virginia doctors have
21 the technology and the ability to early detect.

22 Dr. Gupta was asked:

23 Is the low-dose spiral CT scan, that
24 picture on the bottom, is that what made the

6403

1 early detection of lung cancer in that patient
2 possible?

3 Yes.

4 This isn't pie-in-the-sky science. These are
5 real human beings. They are not statistics. They
6 want to talk about their statisticians and people
7 waiting for mortality. The Court hasn't instructed
8 you on the law of West Virginia that the members of
9 the class are statistics. The Court hasn't
10 instructed you that we have to wait for a bunch of

11 statisticians and numbers crunchers to tell us
12 what's best.
13 We have the law behind us in this case. And we
14 know running away that these two tests -- more
15 likely so than not? Look at this. That's a
16 cigarette company executive. Do you recall we
17 showed you his video, a guy who owns a cigarette
18 company agrees and has funded that which I have
19 tried to prove to you these people in our class so
20 desparately need?

21 And last but not least, everybody, every
22 article that's been shown to you, forget mortality,
23 says the secret to dealing with lung cancer is to
24 catch it early.

6404

1 And look, if you don't think this is
2 revolutionary, if you don't think this is important,
3 look at Dr. Burns. He's written 18 of those
4 articles, teaches medicine in a medical school.
5 Most of the time, when you deal with lung cancer,
6 there isn't anything you can do. You make a
7 diagnosis, and the person is going to die of it.
8 And I think you will recall he gave this answer, it
9 was his last answer, I believe, on redirect.

10 He said:

11 And it's tough as a physician watching
12 those people die, and it's tough not being able
13 to do anything for them. And all of the sudden
14 we can now take the most common cause of death
15 in both men and women and do something about
16 it. I mean, that's what I went into medicine
17 to do was to make a difference and now we can.

18 And we can make a difference right here with
19 these instructions of law. Now, that will get you
20 to page -- gets you to the last page. Here we have
21 got the existence of monitoring procedures exist.
22 Obviously, everybody agrees that procedures exist.

23 And we come to seven. That's the one that
24 deals with willful and wanton and reckless

6405

1 misconduct. Now, all those boards, all of those
2 articles, all of those days of testimony that you
3 had to sit through, that was all relative to this.

4 And don't worry, I'm not going to go through
5 every one of these. But what I want you to realize
6 is, the reason it was so important for me to show
7 you through the evidence the '50s, the '60s and the
8 '70s is because, when you go to Page 27 -- yep, Page
9 27, the Judge says that, when a manufacturer has
10 actual or constructive knowledge of the severe
11 health hazards and continues to design, manufacture
12 and distribute that product, that product, the
13 manufacturer may be found to have engaged in
14 willful, wanton, reckless conduct towards those
15 injured by the product.

16 And he also just briefly -- you know, I'm sure
17 it's clear to you, it breaks down very easily. We
18 showed you that they were marketing the cigarettes
19 as a nicotine delivery device, they were protecting
20 their leading brands, right?

21 What was product stewardship all about? Making
22 sure that our leading brands are good; that they are
23 not any more dangerous than they were in the first

24 place, by expanding brand families.

6406

1 Let's get a blue one out there because it will
2 help increase this one, and we will get a light one,
3 and we will get -- if you are Camel, we will go with
4 a K and a wide body and some lights and some
5 Turkish -- what's this thing called, Turkish Golds,
6 yeah, Turkish Golds.

7 Well, you saw them all. And anyway, what they
8 do, first they deny causation, right; they put
9 lawyers and executives in charge of the health
10 issue, okay. And the problem here is, then they
11 deny, deny, deny and then finally they say, you
12 know, this ain't working so good any more because
13 the evidence is just -- it's up to here,

14 So they start throwing money at problems. And
15 they turn and say, see, that proves we didn't do
16 anything wrong. Well, they knew. They knew what
17 they were making.

18 They knew that they were basically like a
19 pharmaceutical industry, they call themselves that.
20 They knew what they needed to spend in research
21 dollars, consumer products companies, you heard
22 Dr. Farone testify about that.

23 It's not -- it shouldn't be conceived of as a
24 product, but as a package. The product is the

6407

1 nicotine. Even Dr. deBethizy, RJR's stewardship
2 witness, admitted that what he did was to test
3 nicotine most of the time, and the delivery of it,
4 to make sure you didn't get too much. Think of the
5 cigarette pack as a storage container for a day's
6 supply of nicotine.

7 Cigarette as a drug administration
8 system. Thus we have an emerging picture of a
9 fast, highly pharmacologically effective and
10 cheap drug, tobacco, which also confers flavor
11 and manual and oral, bla, bla, bla, and it's
12 cheap and all that.

13 They knew what they were doing. They knew it
14 all along.

15 Could you put up CL2 for me, too? I'm sorry,
16 Kamel Red -- actually I don't want those. I have
17 gone through that already.

18 This is the way they were talking in those
19 years. They want to talk about how that, as long as
20 they can keep making their traditional products the
21 same way, it will be a matter of just getting bigger
22 bags to carry the money to the bank.

23 Those aren't my words. Those are their words.
24 There is a document, if you want to wonder what the

6408

1 motive was for not doing the right thing, that one
2 alone would take care of it.

3 Here is my over favorite. J. Kendrick Wells,
4 the in-house counsel at B&W? We are not going to do
5 the right thing. If we do the right thing, we might
6 get indicted. It would be like Ford Pinto. Here it
7 is.

8 A local court convicted Ford Motor
9 Company of a crime arising out of the
10 defendant's alleged willful misgivings of the
11 gas tank on the Pinto.

12 That's why I don't want to adopt doing the
13 right thing. We have got to deny, deny and deny, or
14 we are going to get in trouble.

15 Look at what the inside people are saying. Do
16 you want to retard an industry, do you want to stop
17 it from moving forward? Frank Colby, RJR, '97:

18 There is no place in the cigarette
19 industry over the long period for someone who
20 believes smoking causes cancer.

21 Get them out of the company, no place for
22 them.

23 American tobacco:

24 We believe that the anticigarette theory

6409

1 is a bum rap.

2 Philip Morris. Chairman of board, '71:

3 We do not believe that cigarettes are
4 hazardous, we don't accept that. The Tobacco
5 Institute, the 1972 report of the Surgeon
6 General, insults the scientific community.

7 Do you really think these people are ever going
8 to get to the bottom of the problem, seriously now?

9 Do you really think they are ever going to get to
10 the bottom of problem talking like that and acting

11 like that?

12 If that is not willful, wanton and reckless
13 misconduct... Look, RJR's research director, 1983:

14 Most people in the company including
15 upper management tried to ignore issues such as
16 smoking and health.

17 Bennett LeBow, 2000, this is the guy who owns
18 the cigarette companies, CEO that's funding the
19 research:

20 The tobacco companies employed a scorched
21 earth strategy, deny, deny, deny, that smoking
22 causes cancer and any other disease.

23 I think you will recall he said that.

24 And here is the consequences of willful, wanton

6410

1 -- what happens is, you stick your head in the sand,
2 decades of opportunity are lost, scientific and
3 technical progress is delayed, and still there is no
4 safe product.

5 Now, if they want to -- I know they want to get
6 up and talk about all the stuff they did. But let
7 me ask you something. The reason I asked Whidby
8 those questions, in the 1960s, five, five and a half
9 years after that Frank Statement, five, five and a
10 half years after they made this Frank Statement,
11 they want to talk about technology.

12 The president of the United States said, and he
13 admitted, we are going to put a man on the moon and
14 we are going to bring him home safe by the end of
15 the decade.

16 And if you recall, he admitted that was said in
17 1961, so they already had lost one year on the
18 project. And you will recall that he also admitted
19 that all of the technological advances to accomplish
20 putting a man on the moon and getting him home
21 safely in 1969, by the end of the decade, were
22 private companies working for NASA on a contract
23 basis.

24 Because you marshal the assets, you marshal the

1 research, you admit you have a goal and you go after
 2 it. And their goal couldn't be clearer.

3 Dr. Farone. You have got to focus on it, you
 4 have got to work -- remember, the person from
 5 Philip Morris who worked here, he was under him,
 6 said he was a good scientist. He worked hard at the
 7 company.

8 He and I developed the visiting scientist
 9 program together that Dr. Lilly was very proud
 10 of. You can't deny there is a problem, you
 11 have got to focus on that problem.

12 What was their real attitude? What was their
 13 real attitude? '66:

14 Our posture with regard to a health
 15 cigarette entry should be determined by
 16 political and market conditions.

17 Where is the memo that says they are having
 18 technical problems? Where is the memo that says we
 19 at Philip Morris, we at RJR, we at Lorillard, we at
 20 Brown & Williamson, we are dedicated to this, we are
 21 going to do this, folks; we are going to create a
 22 safer cigarette, and you better get hopping on it
 23 because we want it up here at corporate office, your
 24 ideas, so we can get with the government and talk to

6412

1 them about it?

2 You won't see that memo. '76:

3 Today we have all the information
 4 necessary to manufacture a reduced hazard
 5 cigarette. '76.

6 The Ariel smoking device is smokable.
 7 Would probably be safe -- would probably be
 8 safer to smoke than an ordinary cigarette, and
 9 manufacture now appears feasible.

10 That was 1967. Do you really believe that a
 11 company with their assets -- what was the testimony,
 12 480, almost half a trillion cigarettes a year that
 13 this industry couldn't and these companies couldn't
 14 do that. '73:

15 We are working to be in a position to
 16 design a cigarette which will meet the less
 17 hazardous specification if they are ever
 18 imposed.

19 You have heard about the lawyer involvement,
 20 you have seen all of those documents. I'm just
 21 reminding you because, under willful and wanton,
 22 Question 7, where they continue to market a
 23 hazardous product, they continue to stick their head
 24 in the sand, you need to recall these documents.

6413

1 They are back there with you.

2 The leadership in the U.S. smoking and health
 3 situation lies with the powerful policy committee of
 4 senior lawyers advising the industry. They make all
 5 the decisions on smoking and health.

6 Brown & Williamson, '66:

7 With this background, remember that the
 8 cigarette companies in the U.S. have given the
 9 prime responsibility in the health area to
 10 their lawyers.

11 Lorillard, '78:

12 We have again abdicated the scientific

13 research to the lawyers.
14 Philip Morris, '78:
15 CTR should be controlled both legally and
16 scientifically by the industry.
17 Brown & Williamson, '84:
18 Direct lawyer involvement is needed in
19 all bad activities pertaining to smoking and
20 health, and it goes on and it goes on and it
21 goes on.
22 You don't design and fulfill your obligations
23 to do these things by abdicating your responsibility
24 to a bunch of corporate lawyers. And they have got

6414

1 every right to hire whoever they want to defend them
2 in a Court of law, and there is no problem with that
3 at all. They can come in here and do a fabulous
4 job. But we are talking about what they were doing
5 with their research.

6 The company testing began to show adverse
7 results pertaining to a particular -- this is the
8 one where they could control it and destroy the
9 research. Philip Morris:

10 If, however, the results with nicotine
11 are similar with those gotten with morphine and
12 caffeine, we will want to bury it.

13 '70: We might perhaps suggest that
14 files in B.A.T. in Louisville be gone through.
15 The latter presumably have already received
16 attention so that any offending documents are
17 removed. Such records could be perfectly
18 properly destroyed in good time.

19 We do not foresee -- this is RJR:
20 We do not foresee any difficult in an
21 event a decision is reached to remove certain
22 reports from the research files. Once it
23 becomes clear that such action is necessary for
24 the successful defense of our present and

6415

1 future suits, we will promptly remove all such
2 reports from our files.

3 Of course, you can get scientists to come in
4 and say, well, they are all there, but this is what
5 they are talking about doing at the company.

6 These are the problems that forever hampered
7 these companies. This is what their corporate
8 people did to them. They didn't work hard enough on
9 it. They wanted to deny it until the late '90s.
10 They viewed the public health groups as enemies.
11 They didn't test the right way. They reluctantly
12 follow and never led.

13 That was the real problem. They were always
14 reacting to what was someone was saying -- you have
15 to do something about this problem -- and turning
16 safety issues over to the lawyers.

17 Do you want to know what they did? Everybody
18 talks about steps in the right direction. I have
19 got some steps in the wrong direction because this
20 is what was really going on.

21 They were expanding their brand families. They
22 were using product stewardship to protect the status
23 quo. In other words, we will test our cigarettes
24 and tell everybody we are doing that, to make sure

6416

1 they are not more toxic than they all are already.
2 Of course, that won't prevent us from going after
3 new market shares, even with wide-body cigarettes.

4 The reactions I have talked about, that
5 attacking the Surgeon General, the libraries,
6 closing down research facilities, you have heard and
7 read about that. And recent decreases in research,
8 I showed you that.

9 Now, if there is any doubt, any doubt -- do you
10 have the paramount consideration, 219?

11 I have told you that we would prove that they
12 willfully and wantonly put profit ahead of people's
13 health. And they did that by putting their head in
14 the sand and increasing their market brands and
15 making sure they could always sell the leaders.

16 And as we sit here today, when you get to the
17 Question 7 on your verdict form, I don't think you
18 are going to have any trouble finding that they knew
19 what they were doing.

20 And it's so clear on this -- would you please
21 put up Mrs. Legg's letter for me. You have seen
22 this twice, but I just wanted to remind you of it.
23 This is to the president of R. J. Reynolds.

24 This is the lady from Huntington, where she's

6417

1 writing, she's 73 years old, she smoked Camels,
2 Winstons and Salems for 55 years. She's not the
3 suing kind, and she's asking for help. Will you
4 help me?

5 What do they write back? Could you put that
6 up, Ms. Gina?

7 We got your letter, sorry to hear you are
8 sick. But our head is still in the sand because,
9 despite everything known today, there is still a
10 controversy.

11 That's not the mistaken words of someone who
12 went, oops, I'm sorry I was negligent. Those are
13 deliberate words. You think that's one example?

14 This poor fellow has written the company that
15 his father has been hospitalized because of lung
16 cancer and he's writing to tell him that and you can
17 see they say:

18 We got your letter of January 4th. It's
19 been forwarded to me for reply. In your
20 letter, you advised the company that your
21 father has been admitted to the hospital with
22 lung cancer.

23 That's not enough. They send him a book.
24 19 -- the company does not regard itself as

6418

1 being in any way responsible. We firmly
2 believe that cigarettes have been unfairly
3 blamed as a cause of human disease. The
4 proposition that cigarettes are at fault has
5 been so widely accepted as fact by so many
6 otherwise responsible people and the evidence
7 to the contrary has been so uniformly
8 disregarded that we cannot blame you and other
9 members of the public for accepting the
10 propositions as fact. I don't wish to burden
11 you, especially at this difficult time in your
12 life, with the details of the smoking and
13 health controversy. However, on the assumption

14 that you may be interested in our side of the
15 matter, we are enclosing a copy of a booklet
16 entitled The Cigarette Controversy.
17 And last but not least, willful, wanton,
18 reckless, total disregard, continuing to sell a
19 product in the face of what they know, how about all
20 of those articles Mr. Newbold showed you, years and
21 years and years of New York Times, Life, Reader's
22 Digest, scientific reports are out there.

23 When did they ever stand up and say, you know,
24 they are right; we have got to do something about

6419

1 this? When did they write the memos that said, you
2 know, folks, here at the company, we at
3 Philip Morris and RJR or Lorillard or Brown &
4 Williamson, we have looked at those articles, and
5 it's time to start making some changes
6 . No. It's one consistent thing theme, ladies
7 and gentlemen. It's one consistent theme. Stick
8 your head in the sand, say there is a controversy,
9 say there is an argument, retard the state of the
10 art, don't do sustain important research to get to a
11 safer product, and what's the result? And now in
12 this courtroom? What's the argument?

13 There is no mortality data. We have got to
14 wait. There is a debate. There is a controversy.
15 Starting to ring true? There is a debate. The jury
16 is still out. We haven't decided yet. Not sure it
17 will reduce mortality. Can't do it. Too soon, too
18 many people will have adverse reactions -- effects,
19 although we don't have any articles to back that
20 up.

21 It's the same old thing. Don't you all let
22 them get away with it. Thank you.

23 Thank you, Your Honor.

24 THE COURT: Do you want to start or do you want

6420

1 to take a break? How do you want to handle it?
2 MR. KLEIN: Your Honor, I just need two or
3 three minutes to set up, and I will be ready to go.

4 THE COURT: We are going to break at noon.

5 MR. KLEIN: Yes, sir.

6 THE COURT: Is that all right with you? You
7 want to do it that way?

8 MR. KLEIN: Yes.

9 THE COURT: Fine.

10 MR. SEGAL: Your Honor, is it okay if I have
11 some people help me get this out of the way for
12 Mr. Klein?

13 THE COURT: Sure.

14 MR. KLEIN: Your Honor, is this okay to leave
15 it there?

16 THE COURT: That's fine. Do whatever you want
17 to do.

18 MR. KLEIN: May I proceed, Your Honor?

19 THE COURT: I'm sorry, yes.

20 MR. KLEIN: Thank you. Good afternoon -- good
21 morning, ladies and gentlemen. On behalf of my
22 colleagues, I want to join with Mr. Segal in
23 thanking you for the incredible attention you have
24 given us throughout these last few weeks and

6421

1 months.

2 And the one favor I have to ask of you this
3 afternoon and this morning is to bear with me a
4 little bit. As you can tell, I'm fast losing my
5 voice. I'm going to try my very best. I hope that
6 doesn't offend you.

7 I'm going to start, ladies and gentlemen, by
8 reminding you who is in this class. Who are these
9 plaintiffs that we call the class? His attorney
10 gave you a definition. I'll just put it up.

11 To qualify for this class, you have to have
12 purchased and smoked cigarettes on or after January
13 31, 1995. Five-pack-year history by December 4, not
14 diagnosed with a smoking-related disease.

15 Some of these folks, ladies and gentlemen,
16 first began to smoke in January of 1995. You have
17 seen documents from 1950s and the 1960s and the
18 1970s. Some of these members of the class first
19 began to smoke in January of 1995.

20 And when His Honor talks to you about the
21 class, he's defined the class for you, but he's also
22 told you that, when you make a decision, in order
23 for the class to carry its burden of proof, it has
24 to be with respect to each and every class member.

6422

1 For the class to carry its burden, it has to
2 apply to all members of the class, not some, not
3 many, all.

4 Jason, if I could have Tab --

5 This is from the charge, Pages 7 through 9 on
6 the burden of proof, the second paragraph.

7 As I have indicated this burden burden of
8 proof standard must be met by all members of
9 the class claiming relief in the form of
10 medical monitoring, hereinafter the class.

11 So when you see "the class" in the Judge's
12 charge, that means all, not some, all.

13 Now, ladies and gentlemen, this case is a
14 little bit different than some other tobacco cases
15 you may have read or heard about before you came
16 into this courtroom, and I want to show you in part
17 why that is.

18 You have heard all of this before. And that's
19 because in this case, ladies and gentlemen, there is
20 no claim that any class member is addicted. There
21 is no claim that class members cannot quit. There
22 is no claim that class members were misled by
23 anything these companies did or said in 1954, 1964,
24 1974, 1984, 1994, 2000. There is no claim that

6423

1 class members underappreciated the risks of
2 smoking.

3 And when Mr. Segal said to you this morning
4 deny, deny, deny so that you keep selling the
5 product, that has nothing to do with this case,
6 because there is no claim here that anybody was
7 misled or underappreciated the risks of smoking.

8 And another thing that should have been on this
9 list and His Honor charged you with it, that is,
10 there is no claim here that the warnings were
11 inadequate.

12 As a matter of law, His Honor has told you in
13 the charge, the warnings which have been on every
14 pack of cigarettes since, I believe, 1968, are

15 deemed adequate as a matter of law to warn smokers
16 of the risks.

17 Mr. Newbold is going to talk to you about those
18 in a little more detail, but two of them are
19 particularly apt to this case.

20 Smoking causes lung cancer and emphysema;
21 quitting now greatly reduces the risk of
22 disease.

23 Now, folks, I'm going to talk to you this
24 morning in my part of the remarks about the product,

6424

1 cigarette, the design, manufacture and sale of
2 cigarette and some of the corporate conduct you have
3 heard about.

4 Mr. Woodside will follow me with very brief
5 remarks about Brown & Williamson. He will be
6 followed by Mr. Newbold, who will talk a little bit
7 about Lorillard and the awareness of the risk,
8 because as His Honor has told you, when you judge
9 our conduct, you have to judge it in connection with
10 what was known and what was not known.

11 And finally, for our side, Mr. Furr will talk
12 to you at some length about the concept of medical
13 monitoring. And that is not just a side issue in
14 this case, as you well know. It's one of the
15 critical issues in this case and makes this case
16 different from any other tobacco case ever tried.

17 And there is a certain irony when I listened to
18 Mr. Segal, there is a certain irony in the medical
19 monitoring program here because who is it that's
20 coming before you today and saying ignore the public
21 health authorities, disregard what public health
22 groups said because every single public health group
23 that has spoken out on the subject has said do not
24 do the medical monitoring program suggested by these

6425

1 folks; they are not safe, accurate and effective and
2 they may do more harm than good. But now it's the
3 class coming to you and saying ignore that.

4 Now, folks, there are a number of things before
5 I move into conduct that we can start off with and
6 say we all agree upon, the folks at this side of the
7 table and folks on my side of the table.

8 And what we agree upon, number one, smoking
9 causes lung cancer and emphysema. No dispute about
10 that.

11 Number two, cigarettes are an incredibly
12 complex product. They look simple, just burn
13 tobacco, but I think, as you have heard, Dr. Lilly
14 came in here and told you the incredible heat, 2000
15 degrees Fahrenheit a cigarette burns at, and the
16 four thousand chemicals and the various combinations
17 of those chemicals as you burn a cigarette. Very
18 complex.

19 Three, a safer cigarette design that the public
20 won't smoke does the public health no good. So in
21 order to try and make a cigarette which affects the
22 public health and does the public health good, it
23 has to have consumer acceptability.

24 Four, the best way to avoid the risks of

6426

1 smoking, avoid the risks of lung cancer and COPD and
2 emphysema is to quit. Everybody agrees with that.

3 There are four claims of this case. I am going
4 to deal with the conduct, and I'm going to go
5 throug